(1)

Supreme Court, U.S.
FILED

No. 04-906 DEC 30 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SHARON ZIMMER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN H. CROUCH, IV
Counsel of Record
W. D. MASTERSON
KILGORE & KILGORE
3109 Carlisle Street
Dallas, Texas 75204
(214) 969-9099

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Congress enacted the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (the "ADA") in order to provide a national mandate for the elimination of discrimination against persons with disability. 42 U.S.C. § 12101(b). Petitioner brings this Petition for Writ of Certiorari to have this Court resolve conflicts between the circuits and confusion arising from this Court's prior decisions so as to establish with certainty what elements disabled individuals must demonstrate in order to avail themselves of this important employment statute. The questions presented are:

1. If the *McDonnell Douglas* burden-shifting analysis applies to ADA cases, what elements must a plaintiff show in order to set forth a *prima facie* case?

2. Has this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) changed the *McDonnell Douglas* burden-shifting analysis for summary judgment in "mixed motive" cases, and, if so, what new analysis should courts apply under the ADA?

3. If the Fifth Circuit Court of Appeals applied the correct test, whether the Court of Appeals properly applied the summary judgment standard in concluding that Plaintiff failed to establish that she was replaced by or treated less favorably than non-disabled employees?

4. Whether the Court of Appeals erred in disregarding direct evidence of discrimination on the basis of disability, including an EEOC determination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	9
I. If the *McDonnell Douglas* burden-shifting analysis applies to ADA cases, what elements must a plaintiff show in order to set forth a *prima facie* case?	10
II. Has this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) changed the *McDonnell Douglas* burden-shifting analysis for summary judgment in "mixed motive" cases, and, if so, what new analysis should courts apply under the ADA?	16
III. If the Fifth Circuit Court of Appeals applied the correct test, whether the Court of Appeals properly applied the summary judgment standard in concluding that Plaintiff failed to establish that she was replaced by or treated less favorably than non-disabled employees?	26
IV. Whether the Court of Appeals erred in disregarding direct evidence of discrimination on the basis of disability, including an EEOC determination?	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bauer v. Albemarce Corp., 169 F.3d 962 (5th Cir. 1999) 18

Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993) 19

Daigle v. Liberty Life Ins. Co., 70 F.3d 394 (5th Cir. 1995) 4, 10

DeLucha v. Winer Industries, Inc., 53 F.3d 793 (7th Cir. 1995) 10

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 22, 23, 24, 25

Ennis v. National Assn. of Business and Educ. Radio, Inc., 53 F.3d 55 (5th Cir. 1995) 10, 12

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978) 13, 18

McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) ..... *passim*

McInnis v. Alamo Community College Dist., 207 F.3d 276 (5th Cir. 2000) 4, 11, 26

Monette v. EDS Corporation, 90 F.3d 1173 (6th Cir. 1996) 11, 12, 14

Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995) 21

Moore v. U.S.D.A., 55 F.3d 991 (5th Cir. 1995) 29

Newman v. GHS Osteopathic, Inc., 60 F.3d 153 (5th Cir. 1995) 10

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989) 20, 21, 22

Rachid v. Jack-in-the-Box, 376 F.3d 305 (5th Cir. 2004) 16, 25

Reeves v. Sanderson Plumbing Co., 530 U.S. 133, 120 S. Ct. 2097 (2000) 19

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) 19

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957) 16

Smith v. Darden, 914 F.2d 1330 (9th Cir. 1990) cert. denied, 501 U.S. 1217 (1991) 11

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) 17, 18

Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (5th Cir. 1985) 21

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983) 11

Williams v. General Motors, 656 F.2d 120 (5th Cir. 1981) 21

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623(a)(1) 15

42 U.S.C. § 12101 ..... 1, 3

42 U.S.C. § 12101(a)(1-4) 3

42 U.S.C. § 12101(a)(5) 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12101(a)(9) 3
42 U.S.C. § 12101(b) 3
42 U.S.C. § 12111(9) 27
42 U.S.C. § 12112 ..... 1, 4
42 U.S.C. § 12112(5)(A) 10, 13
42 U.S.C. § 12112(5)(B) 13
42 U.S.C. § 12112(b)(5) 4, 27
42 U.S.C. § 12112(b)(5)(A) 13

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sharon Zimmer, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the 5th Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is an unreported decision included at Tab A in the Appendix hereto. A Petition for Rehearing was filed, and the Order denying the Petition is included herewith in the Appendix at Tab B. The decision of the trial court entering summary judgment against Plaintiff-Appellant Zimmer was also unreported, and is included in the Appendix at Tab C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 2004. Petitioner timely filed a petition for rehearing that was denied on October 1, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, expressly prohibits discrimination against employees with disabilities. The most pertinent sections for purposes of this case fall under 42 U.S.C. § 12112 and are quoted below:

> (a) **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and

other terms, conditions, and privileges of employment.

(b) **Construction.** As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities of such applicant or employee because of the disability of such applicant or employee;

. . .

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant. . . .

STATEMENT

Introduction. This case raises important questions under the ADA concerning what a plaintiff must show in order to avail herself of the protections of that statute. The 5th Circuit Court of Appeals applied its version of the *McDonnell Douglas* burden-shifting analysis to Petitioner's claims in upholding the trial court's grant of summary judgment. However, the formulation of the showing required to set forth a *prima facie* case under the ADA in

the 5th Circuit is markedly different than that used in other circuits, and expressly contradicts the statute. Furthermore, whether the traditional *McDonnell Douglas* test remains viable in mixed motive cases in light of this Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) remains questionable. In any event, the court of appeals erred in disregarding direct evidence of discrimination, and in finding plaintiff had failed to set forth a *prima facie* case under the facts of this case.

Statutory Framework. Perceiving that a significant number of American workers are burdened with physical or mental disabilities, and that such workers were experiencing discrimination in the workplace, Congress responded with the passage of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. The purpose of the ADA is to provide a national mandate for the elimination of discrimination against persons with disabilities. 42 U.S.C. § 12101(b). The Act opens by reciting that some 43,000,000 Americans have one or more physical or mental disabilities; that discrimination against these individuals continues to be a serious problem in employment and other areas; and that individuals who have experienced such discrimination often have no recourse. 42 U.S.C. § 12101(a)(1-4). This discrimination takes various forms, including outright intentional exclusion, physical barriers, over-protective rules, and exclusionary qualification standards. 42 U.S.C. § 12101(a)(5). Such discrimination denies those with disabilities the opportunity to compete on an equal basis, and costs the United States billions of dollars both from welfare-type costs and from non-productivity. 42 U.S.C. § 12101(a)(9).

In response to this perceived need, Congress enacted the ADA, and expressly forbade discrimination on the

basis of disability. 42 U.S.C. § 12112. In light of the similarity in some respects between ADA cases of disability discrimination and discrimination under earlier federal statutes such as Title VII and the Age Discrimination in Employment Act, the 5th Circuit has applied the *McDonnell Douglas* burden-shifting analysis for circumstantial evidence. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995) (*citing McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1824 (1973)). Under 5th Circuit precedent, in order to gain protection under the ADA, a plaintiff must make a *prima facie* case by showing: (1) she has a "disability;" (2) she is a "qualified individual" for the job in question; (3) an adverse employment action was made on account of her disability; and (4) she was replaced by or treated less favorably than non-disabled employees. *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000). However, this formulation varies significantly from that used by other circuits, in that it appears to require tender of direct evidence to meet the third prong of the test, and expressly contradicts the statute, which affirmatively requires an employer to make a reasonable accommodation or shoulder the burden of explaining why such an accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5). This test further fails to address the situation where the employer had more than one potential motivating reason in taking action against the employee.

Factual Background. Petitioner Sharon Zimmer began working for Defendant in Tulsa, Oklahoma, in 1973. She worked for Southwestern Bell in Oklahoma for approximately thirteen (13) years, from 1973 to 1987. Zimmer initially ended her employment with Southwestern Bell when she moved with her husband to California. 1 R 110.

Zimmer again sought employment with Defendant after moving back to North Texas in the early 1990's. Southwestern Bell employed Zimmer beginning in 1993 at its McKinney call center as a directory assistance operator. 1 R 110-11. Zimmer continued to be actively employed at the McKinney call center without incident until February 1, 1996, when she was involved in a near fatal automobile accident in which her car rolled over and down an embankment, dropping nearly thirty-five (35) feet. 1 R 111.

Zimmer's injuries from her auto accident were severe. She was in a coma twenty-seven (27) days. 1 R 154. Afterwards, she spent another two to three months in a rehabilitation hospital. 1 R 154. She had an open head injury, and broke her right and left wrists, eight ribs, her pelvis, collarbone, shoulder blade and suffered multiple bone injuries. 1 R 154. The doctors did surgery on her leg, and were considering amputating at one point. 1 R 215. Zimmer continues to have problems with her pelvis because of two screws they put in her after the accident. 1 R 215. Indeed, Zimmer's doctors did not think that she would ever walk again. 1 R 215. She still has pain just sitting or standing. 1 R 215.

Zimmer's physical injuries continue to impair her daily living activities. She can cook, but it takes her longer. 1 R 215. Additionally, she cannot clean her house very well. 1 R 215. She cannot work out and/or do aerobics like she could do before the injury, and she cannot go dancing. 1 R 216. It is difficult for her to climb stairs, and she cannot lift more than twenty-five (25) pounds. Additionally, her balance and coordination are off, so there are many things she cannot do. 1 R 215. For example, she cannot do her yard work now, or carry big boxes. 1 R 215. She was initially paralyzed on her left side. 1 R 176. She

did regain some function, and was able to type with one hand. However, she was still partially paralyzed when she returned to work. 1 R 176. She continues to have trouble walking, and cannot walk long distances or climb more than a few stairs, so that even street curbs pose a problem. 1 R 218.

In addition to the physical difficulties, Zimmer also suffers from a "cognitive brain disorder." 1 R 212. This disorder has resulted in both long-term and short-term memory loss. 1 R 215. Zimmer is not capable of learning any new trade because of this. 1 R 215. Zimmer further has balance and coordination problems resulting from the cognitive brain disorder. 1 R 217. Although some of Zimmer's injuries healed after the accident, many of the physical and mental limitations are permanent. 1 R 217.

Notwithstanding her disabilities, plaintiff was able to perform the essential job duties of her job as an information operator with reasonable accommodations. As part of her rehabilitation, a nurse from Zimmer's hospital visited Southwestern Bell and made suggestions as to what reasonable accommodations would allow Zimmer to return to work. 1 R 173. The nurse suggested that Southwestern Bell provide Zimmer with her own specially assigned cubicle, rather than being randomly assigned to a cubicle each work session, so that Zimmer could keep certain equipment settings that would help her perform her job. 1 R 173-74. Management indicated they could accommodate Zimmer by assigning her a special work station. 1 R 175. Zimmer returned to work in September of 1996. 1 R 212. With the accommodation, Zimmer was able to type on the keyboard with her one good hand. 1 R 176. She was able to keep up with the same speed answering calls, and had no

trouble meeting customer demand. 1 R 177. She worked actively until an incident arose in late 1997. 1 R 212.

Zimmer's active employment ended when she got into an argument Thanksgiving Day because someone was in her assigned cubicle. 1 R 212. She told the person "you should show a little bit of common courtesy because there is a note on this position for no one else to sit here because I have to have certain settings because of my disability." 1 R 212. The incident happened because the other operator wanted a seat to better see a football game while working, and did not realize Zimmer would be working that day. 1 R 212. As a result of this incident, Zimmer was given a "DML," or "Decision Making Leave." 1 R 212-13. This was a form of discipline. 1 R 213. Southwestern Bell apparently took no action against the other employee. 1 R 217.

Zimmer was extremely upset by the DML. As a result of the DML, Zimmer took a leave of absence because her doctor put her on short-term disability as a result of her severe stress over the incident. 1 R 213. She did not return to work afterward. 1 R 213. Southwestern Bell left her on disability for an entire year. 1 R 213. Her doctor tried to get her back to work from March 1998 through December 1998. 1 R 213. Her doctor continued to speak to Southwestern Bell personnel with no success. 1 R 213.

The picture is further complicated by the fact that Southwestern Bell closed its McKinney office during the time Zimmer was out on disability. The McKinney location was ideal for Zimmer from the standpoint of her physical limitations, because it was close to her home, required minimal travel and steps, and because she was familiar with the area. After the McKinney office closed, Zimmer requested to return to work. Southwestern Bell only offered her a position in downtown Dallas. 1 R 218.

Zimmer's doctor would not allow her to accept a position in downtown Dallas because of her cognitive brain disorder, and because he felt the drive and the navigation of downtown traffic and physical obstacles would be too much for Zimmer to handle. 1 R 218. Other operators from the McKinney location were allowed to transfer to Garland, Richardson and Plano. 1 R 219-20. Zimmer could have performed her job in these other locations. *Id.* Zimmer alleges Southwestern Bell discriminated against her by failing to allow her to return to work initially at the McKinney office, and subsequently by refusing to allow her to transfer to alternative locations other than downtown Dallas, either on an equal footing with other workers or as a reasonable accommodation of her disabilities.

Zimmer got a letter terminating her employment in January 1999. 1 R 213. Southwestern Bell placed Zimmer on long term pension disability, and terminated her employment effective January 1999. 1 R 189, 213-14. Southwestern Bell also indicated on Human Resources records that she was not eligible for rehire because she "was on an DML for conduct when she went out on disability." 1 R 189. The same report notes under the heading "Explain Unusual Occurrences" that Zimmer "was on disability for [an] entire year." 1 R 189.

Zimmer filed an EEOC charge on March 11, 1999 alleging discrimination in refusing to allow her to return to work and in firing her. 1 R 196. The EEOC subsequently investigated and found in favor of Zimmer by determination letter dated October 12, 2000. 1 R 9-10. After conciliation efforts failed, the EEOC issued a right to sue letter on January 23, 2001, and Zimmer filed suit within 90 days on April 20, 2001. 1 R 1. In light of her limited ability to retrain for other positions, Zimmer

subsequently applied for and now receives Social Security disability benefits. 1 R 221.

The trial court granted summary judgment against Zimmer by order dated January 5, 2004. The trial court applied the 5th Circuit's four-part test for determining whether an ADA plaintiff has set forth a claim, and concluded on multiple grounds that Zimmer had failed to establish a *prima facie* case. On appeal, the Court of Appeals limited its ruling to the final element, and affirmed the trial court on the basis that: "Plaintiff has failed to establish that she was replaced by or treated less favorably than non-disabled employees." Opinion at page 3. The Court of Appeals subsequently denied a petition for rehearing from Zimmer pointing out that Zimmer had also presented direct evidence of discrimination, and that substantial evidence in the record implies that unlike other employees, Zimmer was forcibly retired and placed on disability pension, with a notation that she was ineligible for rehire.

REASONS FOR GRANTING THE PETITION

The 5th Circuit's formulation for setting forth a *prima facie* case under the ADA is clearly erroneous, and at odds with both the ADA itself and the *McDonnell Douglas* formulations for other circuits. This Court has previously held that the *McDonnell Douglas* formulation should not be applied by rote, and, in any event, it is merely a means of establishing a framework for circumstantial evidence pointing in the direction of unlawful discrimination. Furthermore, the 5th Circuit's formulation is faulty because unlike other anti-discrimination statutes, the ADA expressly provides that employers must provide reasonable accommodations, so that the 5th Circuit's requirement that Zimmer show she was treated less favorably than non-disabled employees

reverses the burden of proof under the statute, which expressly provides the employer must provide a reasonable accommodation unless it affirmatively shows the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

Furthermore, this case offers an opportunity for the Court to clarify the law concerning the application of the *McDonnell Douglas* burden-shifting analysis in light of this Court's decision in *Desert Palace* in the context of mixed motive cases. Zimmer has presented evidence that disability was at least one of several motives resulting in her termination from Southwestern Bell. Under the *Desert Palace* case, the court of appeals improperly relieved Respondent from its obligation to show it would have fired her regardless of consideration of her disabilities.

Finally, the 5th Circuit erred in refusing to find direct evidence of discrimination in this case, and in ignoring substantial circumstantial evidence under the *McDonnell Douglas* formulation in refusing Petitioner's appeal. This amounts to a failure to properly apply the required deference at the summary judgment stage whereby reasonable inferences are construed in favor of the non-movant.

I. IF THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING ANALYSIS APPLIES TO ADA CASES, WHAT ELEMENTS MUST A PLAINTIFF SHOW IN ORDER TO SET FORTH A *PRIMA FACIE* CASE?

Like many circuits, the 5th Circuit Court of Appeals has applied the Title VII burden-shifting framework to ADA cases. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995); *see also Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (5th Cir. 1995); *DeLucha v. Winer Industries, Inc.*, 53 F.3d 793, 797 (7th Cir. 1995); *Ennis v.*

National Assn. of Business and Educ. Radio, Inc., 53 F.3d 55, 57 (5th Cir. 1995); *Smith v. Darden*, 914 F.2d 1330, 1339-40 (9th Cir. 1990) *cert. denied*, 501 U.S. 1217 (1991). However, the 5th Circuit's formulation of the *McDonnell Douglas* test for creating a *prima facie* case is markedly different from that used by other circuits. The 5th Circuit uses a four-part test to set forth a *prima facie* case, by requiring that a plaintiff show: (1) she has a "disability;" (2) she is a "qualified individual" for the job in question; (3) an adverse employment action was made on account of her disability; and (4) she was replaced by or treated less favorably than non-disabled employees. *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000). Only after a *prima facie* case has been proved does the 5th Circuit require the employer to set forth a non-pretextual reason for the adverse employment action. Remarkably, the third element would appear to require direct evidence of discrimination on the basis of disability. This Court has long since abandoned any such requirement. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714, 103 S. Ct. 1478, 1481 n.3 (1983) ("[W]e agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent.")

In contrast, most other circuits have stated the formulation in a substantially different manner. For example, in *Monette v. EDS Corporation*, 90 F.3d 1173, 1186 (6th Cir. 1996), the 6th Circuit formulated the test as follows: (1) the plaintiff was disabled; (2) the plaintiff was otherwise qualified for the position, with or without reasonable accommodation; (3) the plaintiff suffered an adverse employment action; (4) the employer knew or should have known of the plaintiff's disabilities; and (5) "the position remained open while the employer sought other applicants or the disabled individual was replaced."

The court further noted that the "precise characterization of the fifth prong of the test was sometimes varied depending upon the factual scenario confronting the court." *Id.* Notably, the 6th Circuit formulation does not require either that the adverse decision was taken on account of the disability, which requirement is essentially tantamount to the requirement of direct evidence, or that the employee was actually replaced by or treated less favorably than non-disabled employees.

Similarly, the 7th Circuit formulation of the *McDonnell Douglas* requirements for a *prima facie* case also substantially differs from the 5th Circuit. Under the 7th Circuit test, an employee must show: (1) the plaintiff is within the protected class, i.e. a "qualified individual with a disability;" (2) he was meeting his employer's legitimate performance expectations; (3) he was fired; and (4) the employees outside of the protected class were treated more favorably.

The 4th Circuit offered yet another variation of the *prima facie* case in *Ennis v. National Assn. of Business and Educational Radio*, 53 F.3d 55 (4th Cir. 1995). Ennis alleged in that case that she was fired by the employer because of her known association with a disabled individual – her adopted HIV-positive son. She alleged that her employer sought to avoid the potentially catastrophic impact of her son's health coverage on the defendant's insurance rates. The defendant responded that the plaintiff's termination was due to poor work performance. Adopting the *McDonnell Douglas* format, the 4th Circuit formulated the *prima facie* case in the context of termination as follows: (1) that plaintiff is within the protected class; (2) that plaintiff was meeting the legitimate expectations of the employer; (3) that plaintiff suffered an adverse employment action; (4) that the adverse action "occurred under circumstances that raised a legitimate

inference of unlawful discrimination." In formulating this test, the court explicitly rejected a requirement that the plaintiff show she was replaced by someone outside of a protected class or, as the district court urged, by someone who was thought by the plaintiff to be outside the protected class. It pointed out that plaintiffs would usually not know whether a replacement was disabled or associated with a disabled person.

As this Court has previously noted, the *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Furthermore, central to the allegations in this case are plaintiff's complaints that Southwestern Bell refused to grant her a reasonable accommodation by insisting she return to work in downtown Dallas, knowing full well that her doctor would not allow her to do so because her disability limited her ability to travel and navigate complex traffic, walking long distances, and curbs. 1 R 213, 218. In circumstances where a reasonable accommodation is a central factor in the employment issue, the traditional *McDonnell Douglas* factors should not apply in the same fashion because the ADA places an affirmative burden of proof on the employer to show that the accommodation would "impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(5)(A). *See also* § 12112(5)(B). Under such

circumstances, numerous circuits have concluded that the *McDonnell Douglas* test has no application.[1]

Furthermore, this Court has expressly rejected the requirement of the fourth element of the *McDonnell Douglas* test (i.e. replacement with a worker outside the protected class) in the context of age discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), this Court addressed the formulation of

---

[1] *See, e.g., Williams v. Channel Master*, 101 F.3d 346-348 n.1 (4th Cir. 1996) *cert. denied*, 117 S. Ct. 1844 (1997) (" . . . the *McDonnell Douglas* test is designed to circumvent a factual dispute over the reasons for the discharge, and is therefore most appropriate when the defendant disavows any reliance on discriminatory reasons for its adverse employment action . . . here, the parties do not dispute that the reason that Channel Master did not permit Williams to return to her job was that her doctor had prevented her from performing her assigned tasks without accommodation. The *McDonnell Douglas* inferential proof scheme is not appropriate where, as here, the reason for discharge is undisputed."); *Monette v. EDS Corp.*, 90 F.3d 1326 (6th Cir. 1996) (*McDonnell Douglas* has no utility in a reasonable accommodation case); *Velteneyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283-84 (7th Cir. 1996) ("this is not a disparate treatment claim but a reasonable accommodation claim, and it must be analyzed differently. Velteneyer is not complaining that FWCS treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other FWCS employee. His complaint relates solely to FWCS' failure to reasonably accommodate his disability. Because this is not a disparate treatment case, the *McDonnell Douglas* burden-shifting method of proof is unnecessary and inappropriate here."); *Vinson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995); *White v. York International Corp.*, 45 F.3d 357, 361 n.1 (10th Cir. 1995) ("Where, as here, an employer readily acknowledges that the decision to terminate the employee was premised . . . on the employee's disability, the ultimate purpose of the [*McDonnell Douglas*] analysis will have been achieved from the outset. In such cases, the objective claims presented may be tested through . . . traditional burdens of proof.").

the *McDonnell Douglas* "*prima facie* case" elements in the context of the ADEA. In particular, the Court addressed the requirement that the plaintiff show he or she was replaced by someone under forty as an element of the *prima facie* case. In overturning this requirement, the Court said:

> The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is limited to individuals who are at least forty years of age. § 631(a). This language does not ban discrimination against employees because they are aged forty or older; it bans discrimination against employees because of their age, but limits the protected class to those who are forty or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas prima facie* case.

Id. 517 U.S. 308, 311. The same rationale would obviously hold true for disability discrimination, since there can be various degrees of disability. Presumably, those employees less disabled than Zimmer were not forcibly retired to a pension disability status.

II. HAS THIS COURT'S DECISION IN *DESERT PALACE, INC. V. COSTA*, 539 U.S. 90 (2003) CHANGED THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING ANALYSIS FOR SUMMARY JUDGMENT IN MIXED MOTIVE CASES, AND, IF SO, WHAT NEW ANALYSIS SHOULD COURTS APPLY UNDER THE ADA?

Over a year ago, in June 2003, this Court decided *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which was an appeal from a jury verdict where the jury found that the employer's discharge of Ms. Costa violated Title VII. The Supreme Court held in *Desert Palace* that circumstantial evidence is sufficient, and may even be preferable to direct evidence:

> The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).
>
> The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required. (Citations omitted)

Id. at 99.

The meaning of *Desert Palace* has been vigorously argued in many subsequent cases and totally overlooked by almost as many. In June 2004, the 5th Circuit decided *Rachid v. Jack-in-the-Box,*[2] and the Opinion in that case

[2] *Rachid v. Jack-in-the-Box*, 376 F.3d 305 (5th Cir. 2004).

attempts to reconcile the *Desert Palace* with previous law in the context of age discrimination. However, before the 5th Circuit's treatment of mixed motive cases can be addressed, some background is necessary.

A. The *McDonnell Douglas* Method of Proof – The Standard Since 1973

Over thirty (30) years ago, the Supreme Court decided *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 1824 (1973) setting forth the proof methodology to be used in a Title VII discrimination case at the summary judgment stage in those cases where the evidence was entirely circumstantial. It has also become the standard for use in all other types of discrimination claims. As a result of the *Desert Palace* decision a serious argument has raged over what standard now applies at the summary judgment stage. Plaintiff attorneys contend that *Desert Palace* replaces all or part of *McDonnell Douglas* – thus making a summary judgment more difficult for Defendants to obtain. Defense attorneys, on the other hand, point out that the *Desert Palace* Opinion did not mention *McDonnell Douglas* and that the Court therefore had no intention of changing or overruling its 30 year reign as the standard for deciding summary judgments.

McDonnell Douglas, as amplified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), specified that, in order for a plaintiff to survive a motion for summary judgment when only circumstantial evidence of discrimination was available he/she: (1) had to establish a "prima facie case" of discrimination; and (after the employer offered its legitimate reason for its action) (2) had to establish that the non-discriminatory

reason offered by the employer was false ("unworthy of credence").[3]

After jury trials were allowed in Title VII discrimination cases by the Civil Rights Act of 1991, the motion for summary judgment procedural device became a formable first line of defense for employers. Initially, the *prima facie* case (Step 1) was supposed to be easy for the plaintiff to establish. The Supreme Court attempted to make this very clear early, stating that a *prima facie* case could be established by evidence that permitted an inference of discrimination – which could be done many different ways.[4] However, it did not remain that way in practice, and decisions can be found which say that a plaintiff must either show that he/she was replaced by a non-minority, or must show that some non-minority was treated more favorably under the same circumstances.[5] Of course, this case fits into this category.

In reality, facts which will permit an inference of discrimination come in many different and diverse forms, and do not necessarily fit into these molds. For example, if the discharged employee was the only one in the job classification or was not replaced at all (or the job was divided among many others) the plaintiff cannot show replacement by a non-minority. Likewise, if the plaintiff's alleged offense was different from that of any other employee, he/she will fail to show that a non-minority was

---

[3] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1095 (1981).

[4] *Burdine, supra* p. 1094; *Furnco Const. Corp v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 2949 (1978).

[5] *See, Bauer v. Albemarce Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). A more encompassing phrase is sometimes added, stating "or otherwise show discrimination") but this test is often lost in the actual analysis.

treated differently. In these examples, if the Court adheres to the *McDonnell Douglas* requirement (as it has evolved) the plaintiff will fail to prove a *prima facie* case – regardless of any other evidence that points to discrimination.

Step 2 for the plaintiff under *McDonnell Douglas* has undergone like development, and until recently it was an even bigger hurdle. This came about because of two concepts that developed. One such hurdle was a court-created expansion of the requirement to show that the employer's reason was false. This expansion became known as the "pretext-plus" requirement. This required the plaintiff to go *beyond* showing that the reason given by the employer was false, and required the plaintiff to show that the falsity was actually advanced as a pretext *for the very purpose of hiding the employer's discriminatory motive* – as distinguished from it having some other motive for lying.[6] This was virtually impossible to prove without what amounted to "direct" evidence of discriminatory intent. But, if the plaintiff had such "direct" evidence available, he/she did not even need to use the *McDonnell Douglas* approach in the first place (as discussed later). The "pretext plus" requirement flourished in the 5th Circuit for many years but officially died when the Supreme Court overruled that Court in *Reeves v. Sanderson Plumbing Co.* in 2000.[7]

---

[6] The classic case is *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) where the Court stated: "To avoid summary judgment . . . he must now produce sufficient evidence to establish that PPG's reasons were pretext for age discrimination." *Id.* at 958 (emphasis by the Court).

[7] *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 120 S. Ct. 2097 (2000). Many thought that it had been put to rest earlier by the 5th Circuit itself in *Rhodes v. Gaiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) en banc.

B. Enter *Price Waterhouse*/The Mixed Motive Method of Proof

Ms. Hopkins did not make partner at Price Waterhouse and claimed that her sex was the reason. The evidence showed that she had some performance problems, but also that she was criticized as being too abrasive and pushy for a female and did not fit the "lady like mode" that the male partners desired. The Supreme Court concluded that the evidence showed that two motives were involved in the Company's action, one being a legitimate criticism of her job performance and the other being related to her sex (too aggressive for a female). The Court announced what it called the "*mixed motive*" concept and held that, where an unlawful motive (sex discrimination) was shown to be involved, that without the need to prove the Company's reason false, the plaintiff had established her case of discrimination. The Court went on to hold that, when both a legal and illegal motive were shown to be motivating factors, the plaintiff would prevail, *unless the Defendant showed, as an affirmative defense*, that it would have taken the same action without the illegal motive being present. This method clearly eased the burden of proof for plaintiffs and shifted more to the Defendants.[8]

C. Exit the Mixed Motive Method of Proof

For a moment it appeared that *Price Waterhouse* would share the stage with *McDonnell Douglass*. However, Justice O'Connor wrote a concurring Opinion in *Price Waterhouse* and announced her interpretation of what the Court meant in its Opinion (*but what it didn't say*). She could see the

[8] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989).

conflict with the *McDonnell Douglas* proof methodology and announced that, what the Court meant was that, for the *Price Waterhouse* "mixed motive" format to apply, there had to be *"direct" evidence of discrimination*. She said that Ms. Hopkins had presented such evidence.[9]

Faced with the question of which method of proof to utilize, the lower Courts almost uniformly adopted the *direct evidence* requirement for application of the mixed motive method, as suggested by Justice O'Connor.[10] "Direct" evidence, as defined, means evidence where no inference is necessary to determine its meaning – in other words it is basically a confession of illegal action.[11] Since persons violating the law very seldom make such admissions it is not surprising that the "mixed motive" method of proof has lain fallow, because the plaintiff seldom could produce such "direct" evidence.

The use of the term "mixed motive" to describe the *Price Waterhouse* method of proof was unfortunate in a way because it led to the *McDonnell Douglas* approach being called the "single motive" method. In reality, there is no such thing as a single motive case! The employer always provides some proof of a legitimate reason. If it were not provided, judgment would be rendered for the plaintiff as a matter of law under the *McDonnell Douglas* formula.[12] Thus in virtually every instance, where the

---

[9] *Price Waterhouse,* 109 S. Ct at 1801.

[10] For example, *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995).

[11] All illustration of direct evidence was given by the 5th Circuit in *Williams v. General Motors*, 656 F.2d 120, 130 (1981).

[12] *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) contains a detailed explanation of the presumption created by the *prima facie* case.

plaintiff makes out a *prima facie* case, some proof of *both* an illegal and legitimate motive is put into evidence.

D. Enter Congress

There was displeasure in Congress with that portion of the *Price Waterhouse* decision that permitted a Defendant to *totally escape* any liability by showing that it would have taken the same action even if the illegal motive were not present. Thus it legislated changes in Title VII to say that, if the plaintiff could show that an illegal motive was a motivating factor, a Defendant could only *partially escape*.[13] If it could prove, as an *affirmative* defense, that it would have taken the same action anyway, the Defendant would not be liable for back pay or front pay damages but would still be liable for attorneys' fees and costs. Thus, this defense is referred to by the Courts as the "limited affirmative defense." Congress *did not address* the severe limitation written into the *Price Waterhouse* decision by the lower courts' adoption of Justice O'Connor's requirement of "direct evidence," which, as a practical matter, nullified the impact of *Price Waterhouse* anyway! The various other anti-discrimination statutes, including the ADA, were not similarly amended by Congress.

E. Enter *Desert Palace*

The *Desert Palace* case was tried to a jury, and the Trial Court, having read what Congress had done in amending Title VII, concluded that a "mixed motive" submission to the jury was required. There was *no direct evidence* in the case and the Trial Court made its submission to the jury

---

[13] *See* discussion in *Desert Palace*.

based on the argument that the amendments to the statute required that the "mixed motive" method be used in purely circumstantial evidence cases. Two questions were asked of the jury – (1) Do you find that a motivating factor was plaintiff's sex, and (2) if so, would the Defendant have taken the same action without considering her sex? The jury answered that sex was a motivating factor in Defendant's action and it answered "no" to the "same action" defense. On appeal to the 9th Circuit an *en banc* decision resulted.[14] Since the case had already gone to trial it did not present the issue at the summary judgment phase of a case, (where *McDonnell Douglas* has application) however, three dissenting judges noted that, *without the requirement of "direct evidence" a conflict was created with the McDonnell Douglas methodology* at the summary judgment stage.[15]

In its Opinion the Supreme Court discussed the changes made by Congress and agreed with the 9th Circuit that Congress intended that, if an illegal motive is shown by *either direct or circumstantial evidence*, the burden shifts to the Defendant to prove its limited affirmative defense. The Court spent much of its time in the Opinion discussing how circumstantial evidence could be as reliable as direct evidence, and clearly held that it was discarding the "direct" evidence distinction which Justice O'Connor had drawn. (It did not say that Justice O'Connor had been wrong, but instead based its decision on the changes made by Congress.) What the Court *did not mention in any way is what impact, if any, it viewed its decision as having on the McDonnell Douglas method of*

---

[14] 299 F.3d 838 (9th Cir. 2002)

[15] p. 867

proof. But it cannot be said that, by its silence, the Supreme Court was unaware of what it was doing. The Opinion of the three dissenting judges in the 9th Circuit specifically called it to the Court's attention. Furthermore a reading of the oral argument before the Court shows that numerous questions were asked about *McDonnell Douglas* and what impact the decision would have thereon. (One portion of the oral argument confirms what is said above about any case that goes forward being a "mixed motive" case. Following a question about this, the Justices laughed, saying that "single motive" cases "always settle.")[16] But, since the Supreme Court did not specifically say what it was doing to *McDonnell Douglas*, the two proof methodologies stand side-by-side unexplained, awaiting evaluation by each Judge who is asked to rule on a motion for summary judgment in Title VII or ADA cases.

Many different views have been asserted to explain the disparity between the two methods of proof. Several Courts have concluded that, at the motion for summary judgment stage, the facts should be evaluated separately under both methods. Some other Courts have concluded that the *McDonnell Douglas* approach was dead or almost so. Many of the cases decided subsequent to *Desert Palace* have made no mention whatsoever of it, and have simply continued to use the *McDonnell Douglas* method without comment. Additionally, arguments have been made by some defense counsel that Desert Palace only applies when a case reaches the trial stage. Others have argued that the plaintiff must specifically plead a "mixed motive" case. No case has been found where either of these arguments succeeded.

---

[16] 2003 WL 2011040 p. 16

In an effort to comply with this Court's decisions, the 5th Circuit in an age discrimination case entitled *Rachid v. Jack-in-the-Box*, 376 F.3d 305 (5th Cir. 2004), held that *Desert Palace* created a "modified *McDonnell Douglas* method." The modification found by the Court was to the last step of the *McDonnell Douglas* method. It held that, at that point, the plaintiff could defeat a motion for summary judgment by showing the employer's explanation was false, or by showing that the prohibited reason was one of several motives for the employer's action (i.e. mixed motive). Although *Desert Palace* was a Title VII case, the 5th Circuit held that *Desert Palace* also applied to an ADEA case such as *Rachid*'s.

The 5th Circuit felt the need to fit mixed motives into the *McDonnell Douglas* scheme as an option to the third step, which makes it unnecessarily complex. The mixed motive analysis permits a much simpler approach to a motion for summary judgment. When the plaintiff initially presents adequate proof to raise a fact issue of discrimination, the burden should simply shift to defendant to create its affirmative defense, which will require a jury trial unless the Court can find that the affirmative defense prevails as a matter of law. In this case, the employment records produced by Southwestern Bell affirmatively show plaintiff's disability was a factor in her separation. The personnel document showing plaintiff's discharge expressly states that she was out for a year on disability, that she was retired and placed on disability status, and that she was ineligible for rehire in part as a result of her disability. 1 R 189. Under the *Desert Palace* mixed motive test, this clearly creates an inference of discrimination, so that an affirmative burden is on the defendant to demonstrate Zimmer would have been fired regardless of her disability status.

III. IF THE COURT OF APPEALS APPLIED THE CORRECT TEST, WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THE PLAINTIFF HAD FAILED TO ESTABLISH THAT SHE WAS REPLACED BY OR TREATED LESS FAVORABLY THAN NON-DISABLED EMPLOYEES.

As noted above, the plaintiff in a disability discrimination could traditionally provide either direct evidence of discrimination, or use the *McDonnell Douglas* Title VII burden-shifting analysis for circumstantial evidence. The trial court and 5th Circuit both applied the *McDonnell Douglas* test under which plaintiff must prove a *prima facie* case by showing: (1) she has a "disability;" (2) she is a "qualified individual" for the job in question; (3) an adverse employment action was made on account of her disability; and (4) she was replaced by or treated less favorably than non-disabled employees. *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000). The 5th Circuit found against Zimmer in its opinion dated August 31, 2004, holding that Zimmer failed to demonstrate the fourth element that she was replaced by or treated less favorably than non-disabled employees. Opinion at 4-5.

The 5th Circuit erred in its conclusion, and clearly failed to find all reasonable inferences in favor of Zimmer, as it was required to do in the context of a motion for summary judgment. The evidence shows convincingly Zimmer was treated less favorably than non-disabled employees. Zimmer was fired, and involuntarily placed on pension disability. 1 R 189, 213-14. Zimmer testified that non-disabled employees were given the opportunity to transfer to other locations in Garland, Greenville, and other locations. 1 R 219-220. Zimmer further testified

there were positions open in Plano and Richardson. 1 R 219. Again, Zimmer was offered none of these locations. 1 R 220. Under the Americans with Disabilities Act (the "Act" or the "ADA"), failure to make reasonable accommodations for a qualified individual with a disability constitutes discrimination. 42 U.S.C. § 12112(b)(5). Reasonable accommodations include reassignment to vacant positions. 42 U.S.C. § 12111(9).

The 5th Circuit complained that: "Zimmer offered no evidence, however, that others were offered jobs at more than one facility. Nor did she produce evidence that she requested that she be placed in one of the smaller cities." Again, the 5th Circuit erred in both assertions. Zimmer testified to the fact that her doctor engaged in numerous conversations with Southwestern Bell attempting to negotiate Zimmer's return to work. 1 R 213-14. Southwestern Bell made no showing to disprove that Zimmer's psychiatrist requested alternate locations. Furthermore, the EEOC made a determination against Southwestern Bell, and attempted to negotiate a reasonable accommodation on her behalf. 1 R 9. Again, Southwestern Bell makes no showing that change in location was not the principal focus of these discussions. Finally, ¶ 29 of plaintiff's Original Complaint makes plain that plaintiff was seeking a reasonable accommodation in the form of a closer work site:

> 29. Defendant's unlawful and intentional refusal to continue to provide Plaintiff reasonable accommodations at the McKinney call center and to suggest that she could only keep her job with Defendant if she transferred her employment to a different call center which would necessitate that she either drive or take public transportation many miles from her home, which she purchased

> near her then existing place of employment with Southwestern Bell Telephone within five (5) minutes of the McKinney facility, constitute a constructive discharge in an unlawful and intentional violation of the ADA, thereby making Defendant liable for such legal and equitable relief as may be appropriate.

Complaint at ¶ 29, 1 R 5.

Furthermore, the evidence plainly shows Zimmer was treated less favorably than non-disabled employees because she was terminated without possibility of rehire. As noted, non-disabled employees were relocated to other facilities. This necessarily implies such employees were eligible for rehire by Southwestern Bell as positions became available. Zimmer had previously availed herself of the "eligible for rehire" classification when she returned to Southwestern Bell after moving away. 1 R 110-11. This time, however, Zimmer was involuntarily discharged, placed on pension disability leave, and her file was marked indicating she was not eligible for rehire due to reasons directly related to her disability. 1 R 189. Applying the reasonable inference that non-disabled employees were not placed on disability pension status, and therefore made not eligible for rehire, the 5th Circuit failed to properly apply the required level of deference due plaintiff at the summary judgment stage.

IV. WHETHER THE COURT OF APPEALS ERRED IN DISREGARDING DIRECT EVIDENCE OF DISCRIMINATION ON THE BASIS OF DISABILITY, INCLUDING AN EEOC DETERMINATION?

As noted above, traditionally under 5th Circuit precedent a plaintiff can avoid the rigors of the *McDonnell*

Douglas analysis by providing direct evidence that disability was a motivating cause for the adverse action taken against her. *Moore v. U.S.D.A.*, 55 F.3d 991, 995 (5th Cir. 1995) ("In the rare situation in which the evidence establishes that an employer openly discriminates against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination.")

In this case, the summary judgment record contains such direct evidence. Zimmer attempted to return to work from March through December 1998. At the end of 1998, she was involuntarily discharged and placed on pension disability when she was unable to accept a position working for Southwestern Bell in downtown Dallas. 1 R 189, 213-14. The reasons for Zimmer's discharge are contained in her employment file. 1 R 189. This file plainly shows disability discrimination was a motivating factor in the discharge of plaintiff and in marking her as being ineligible for rehire. Specifically, item #22 indicates Zimmer was not eligible for rehire because: "Ms. Zimmer was on a DML [decision making leave] for conduct when she went out on disability." The following paragraph 23 indicates the reason for leaving as being: "Ms. Zimmer was placed on long term disability." On the same document, the record contains the notation under the caption "Explain Unusual Occurrences" that Zimmer was "on disability for entire year." This statement constitutes direct evidence of discrimination against Zimmer on the basis of her disability.

Furthermore, the EEOC conducted an investigation, and found "reasonable cause to believe that there is a violation of Title I of the Americans with a [sic] Disabilities Act of 1990." 1 R 9. The findings of a governmental agency whose express purpose is to investigate such discrimination

should constitute sufficient evidence to create a fact issue when the deferential summary judgment standard is properly applied.

CONCLUSION

This Court should grant a writ a certiorari to address the important employment law issues raised by this case under the Americans with Disabilities Act. Like many disabled Americans, Zimmer wants to be a productive member of society. Because of her learning disability and her physical limitations, she cannot retrain in another profession. The 5th Circuit applied an erroneous standard of law in refusing to overturn the trial court's summary judgment, and has denied Zimmer her livelihood. This Court should grant certiorari to answer significant questions of law under the ADA, and give Zimmer her day in Court.

Respectfully submitted,

KILGORE & KILGORE, PLLC

JOHN H. CROUCH
SBN 00783906
W. D. Masterson
State Bar No. 13184000

3109 Carlisle, Suite 200
Dallas, Texas 75204
(214) 969-9099 – Telephone
(214) 953-0133 – Fax

Attorneys for Petitioner
Sharon J. Zimmer

No. _____

In The
Supreme Court of the United States

SHARON ZIMMER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO PETITIONER ZIMMER'S PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

Decision of United States Court of Appeals for the Fifth Circuit Affirming the Trial Court's Judgment ..... App. 1

Memorandum Opinion and Order of the United States District Court for the Eastern District of Texas, Sherman Division, Granting Defendant's Motion for Summary Judgment (1 R. 230-46) ..... App. 6

Final Judgment of the United States District Court for the Eastern District of Texas, Sherman Division, Granting Defendant's Motion for Summary Judgment (1 R. 247) ..... App. 25

Order of the United States Court of Appeals for the Fifth Circuit Denying Plaintiff-Appellant's Petition For Rehearing ..... App. 26

EEOC Determination (1 R. 9-10) ..... App. 28

Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* ..... App. 30

EEOC Charge of Discrimination (1 R. 196) ..... App. 55

Plaintiff's Original Complaint Filed in the United States District Court, Eastern District of Texas, Sherman Division (1 R. 1-10) ..... App. 58

Human Resources Termination Record (1 R. 181-82, 183-84, 189) ..... App. 68

Zimmer Deposition Excerpts (1 R. 134-79, 212-21) ..... App. 75

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

04-40141
Summary Calendar

SHARON J. ZIMMER,

Plaintiff-Appellant,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(4:01-CV-139)
(Filed August 31, 2004)

Before DUHÉ, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Plaintiff-Appellant Sharon Zimmer was employed as a directory assistance operator with Defendant-Appellee Southwestern Bell Telephone Company (SWBT) in McKinney, Texas. After an automobile accident on February 1, 1996, Zimmer was on short-term disability leave

---

[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

until September 1996.[2] She then resumed her job without incident until November 1997. On Thanksgiving Day she created an office disturbance, causing customer service to be affected, according to SWBT's investigation.[3] She was given one-day Decision Making Leave, with pay, to decide whether she wanted to keep her job or not. On her leave day Zimmer visited her psychiatrist, and the doctor put her on short-term disability leave because of stress.[4]

While Zimmer was on leave, SWBT closed its McKinney facility and offered her a position in downtown Dallas. Zimmer rejected that offer. SWBT changed Zimmer's status to retired and gave her permanent pension disability and lifetime medical and dental benefits.[5] Zimmer sued SWBT for discrimination under the Americans with Disabilities Act, and the district court denied her all relief on a motion for summary judgment by SWBT. We affirm.

I.

A plaintiff makes a prima facie showing of ADA discrimination by establishing that she 1) is disabled or is regarded as disabled; 2) is qualified for the job; 3) was subjected to an adverse employment action on account of her disability; and 4) was replaced by or treated less favorably than non-disabled employees.[6] Granting summary judgment for SWBT, the district court found that

---

[2] R. 142-43.

[3] R. 184.

[4] R. 159-60, 170-73, 213.

[5] R. 145-148, 189, 191.

[6] *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000).

Zimmer failed to produce evidence that she is disabled or regarded as disabled, that SWBT took adverse employment action against her because of her disability, and that the SWBT treated her less favorably than other non-disabled employees similarly situated.

A plaintiff's failure to establish a genuine issue of material fact on any of the essential elements of her claim entitles defendant to summary judgment.[7] We affirm on the basis that Plaintiff has failed to establish that she was replaced by or treated less favorably than non-disabled employees.

With the closure of the McKinney facility, Plaintiff was not replaced at all. Nor has she shown that SWBT treated her less favorably than other non-disabled employees similarly situated. Upon closure of the McKinney office, she was offered her same position in the downtown Dallas office. Zimmer testified that her doctors would not allow her to accept a position that would require her to walk on curbs and face the stress of traffic.[8]

According to Zimmer, some other "surplussed" employees were offered positions in Garland, Greenville, Plano, and Richardson.[9] Zimmer offered no evidence, however, that others were offered jobs at more than one facility. Nor did she produce evidence that she requested a placement in one of the smaller cities. Her argument that SWBT employees did not testify that they did not know she was requesting assignment to a more convenient

---

[7] *See Blanks v. Southwestern Bell Communs., Inc.*, 310 F.3d 398, 402 (5th Cir. 2002).

[8] R. 218-19.

[9] R. 218-20.

facility is beside the point, because Zimmer herself bore the burden of proof on this element.[10]

Even with all the evidence viewed in Zimmer's favor, her ADA claim fails because she has not shown that she was treated differently from others similarly situated.[11]

While the district court presented a careful analysis of other elements of Zimmer's claim, if she failed to establish the essential element that the SWBT treated her less favorably than other non-disabled employees similarly situated, that element alone is dispositive.[12]

---

[10] *See McInnis,* 207 F.3d at 279 (plaintiff must first make prima facie showing to establish each element); *see also Burch v. City of Nacogdoches,* 174 F.3d 615, 621 (5th Cir. 1999) ("[W]e will not attribute extra-sensory perception to the [employer]: the record does not offer a single example of [plaintiff's] asking the [employer] to transfer him. . . . ").

[11] *See Nacogdoches,* 174 F.3d at 621 n. 11 ("Had [plaintiff] shown that the [employer] treated him differently from others similarly situated by not reassigning him under identical conditions, his position on appeal would have been much stronger. . . . Construing the facts in the light most favorable to [plaintiff] does not require us to credit otherwise unsupported assertions."); *see also Daugherty v. City of El Paso,* 56 F.3d 695, 700 (5th Cir. 1995) ("What [plaintiff] failed to show, however, was that any such alleged failings [in the employer not matching displaced employees to openings, lining up interviews, etc.] were the result of discrimination based on his disability. There was no proof that the [employer] treated him worse than it treated any other displaced employee,") *cert. denied,* 516 U.S. 1172, 116 S.Ct. 1263, 134 L.Ed.2d 211 (1996).

[12] *Herrera v. Millsap,* 862 F.2d 1157, 1159-1160 (5th Cir. 1989) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

II.

The remaining two assignments of error are the court's exclusion of Zimmer's evidence and argument that she is substantially limited in the major life activity of learning, and the court's disallowance of an amendment to the complaint to assert a learning disability. These two errors could affect only the court's determination that Zimmer is not disabled. Our decision does not turn on the disability element of Zimmer's claim. With or without the amendment or the evidence, Zimmer failed to establish a genuine issue of material fact on an essential element of her claim as discussed in Part I. SWBT is entitled to judgment as a matter of law under Rule 56(c).

The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

SHARON J. ZIMMER,	§	
Plaintiff,	§	
	§	
v.	§	4:01CV139
SOUTHWESTERN BELL TELEPHONE COMPANY,	§	
	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant Southwestern Bell Telephone Company's ("Southwestern Bell") Motion for Summary Judgment. The Court, having considered the motion and Plaintiff Sharon J. Zimmer's ("Plaintiff") response, is of the opinion that Defendant's motion should be granted.

Introduction

Plaintiff began her employment with Southwestern Bell in 1973 at one of its facilities in Oklahoma where she worked until 1987. While employed with Southwestern Bell in Oklahoma, Plaintiff held various positions, including long distance operator, accounting clerk, engineering clerk, and cable clerk. Plaintiff voluntarily left Southwestern Bell in 1987 in order to move to California with her former spouse. On May 17, 1993, Plaintiff was hired again by Southwestern Bell to work as a directory assistance operator in McKinney, Texas. Plaintiff's job duties included

receiving incoming calls from telephone customers, processing customer requests for directory listings, inputting information into a computer using a keyboard, and communicating directory listings to the customer in a timely manner.

Plaintiff worked at Southwestern Bell without incident until February 1, 1996, when she was involved in an automobile accident. While being pursued by a police officer after leaving a Dallas nightclub, Plaintiff lost control of her car on a patch of ice. As a result of this accident, Plaintiff sustained injuries to her head, wrists, ribs, pelvis, collarbone and shoulder. Plaintiff additionally sustained an open head injury that allegedly caused a cognitive brain disorder that affected her memory and ability to learn new things. Her injury also caused some paralysis to her left hand. Plaintiff took a short-term disability from her job at Southwestern Bell until September of 1996 when she returned to her position as a directory assistance operator.

As a result of her alleged cognitive brain disorder, Plaintiff requested a permanent assignment to one workstation, rather than rotating to a new workstation each day. Plaintiff made this request because she had difficulty readjusting the seat monitor and keyboard to specific settings. Plaintiff performed her duties as a directory assistance operator without notable incident from September of 1996 until November of 1997. On Thanksgiving Day of 1997, Plaintiff arrived at her workstation and discovered that the settings on her chair and keyboard at her workstation had been changed. Plaintiff adjusted the settings and began working. Shortly after Plaintiff began working, another employee, who had been sitting at Plaintiff's workstation, approached and indicated that he

thought Plaintiff was not working on Thanksgiving. Plaintiff confronted the individual, and other operators reported to Plaintiff's supervisor that Plaintiff caused a disruption in which Plaintiff reportedly threw the individual's headset onto the floor. Shortly after the incident, Plaintiff's supervisor Linda Baird investigated the occurrence. After concluding the investigation, Baird disciplined Plaintiff for causing a disruption in the workplace. Plaintiff received a Decision Making Leave of Absence ("DML") on December 7, 1997. The DML gave Plaintiff one day of paid leave of absence to consider whether she desired to remain employed with Southwestern Bell.

Plaintiff took her day of paid leave of absence and visited a psychiatrist for the alleged stress and anxiety she suffered as a result of the DML. Plaintiff did not return to work at Southwestern Bell, but instead began a short-term disability leave of absence that continued until January of 1999. Southwestern Bell closed its McKinney call center and made efforts to relocate its surplus employees. Southwestern Bell offered Plaintiff a position as a directory assistance operator in its Dallas call center. Plaintiff refused this position claiming that driving to Dallas would cause her stress and anxiety. Plaintiff ultimately retired to long-term disability in January of 1999 and continues to receive a monthly benefit check and lifetime medical and dental benefits from Southwestern Bell.

Plaintiff filed a charge of discrimination against Southwestern Bell with the Equal Employment Opportunity Commission ("EEOC") on March 11, 1999. She charged Southwestern Bell with disability discrimination. On April 23, 2001, Plaintiff filed this suit against Southwestern Bell

alleging disability discrimination and wrongful termination.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enters. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Federal Rule of Civil Procedure 56 does not impose a duty on a district court to "sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citations omitted). Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Such nonmovant must also articulate the precise manner in which evidence he sets forth supports his claims. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) (citation omitted). Moreover, in designating specific facts, the nonmovant must

"'go beyond the pleadings'" and use "'his own affidavits, . . . deposition[s], answers to interrogatories, and admissions on file.'" *Jones v. Sheehan & Young Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) (citation omitted).[1]

If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex,* 106 S. Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2511 (1986) (citations omitted).

Discussion

I. Disability Discrimination

Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability because of the disability. . . ." 42 U.S.C. § 12112(a) (West 1995); *see also Daugherty v. City of El Paso,* 56 F.3d 394, 396 (5th Cir. 1995). Because this is a case brought under the ADA where only circumstantial evidence is

[1] The Court also notes that Local Rule CV-56(b) states that a party's response to a summary judgment motion should "be supported by appropriate citations to proper summary judgment evidence. . . ." Local Rule CV-56(c) further states that the Court will not "scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

offered to show the alleged unlawful discrimination, this Court applies the *McDonnell Douglas,* Title VII burden-shifting analysis. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995) (citing *McDonnell Douglas Corp. v. Green,* 93 S.Ct. 1817, 1824 (1973)). Under this framework, Plaintiff must first make a prima facie case by showing (1) she has a "disability" or is regarded as having a "disability"; (2) she is a "qualified individual" for the job in question; (3) an adverse employment action was made on account of her disability; and (4) she was replaced by or treated less favorably than non-disabled employees. *McInnis v. Alamo Community College Dist.,* 207 F.3d 276, 279-80 (5th Cir. 2000) (citation omitted). Assuming Plaintiff is successful in making out her prima facie case for disability discrimination, the burden shifts to the Defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 280. If and when the employer establishes such a reason, the burden then shifts back to Plaintiff to establish by a preponderance of the evidence that the articulated reason was merely a pretext. *Id.*

A. Plaintiff is not disabled under the ADA

To come within the protection of the ADA, Plaintiff must first establish that she has a "disability." Under the ADA, "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Dupre v. Charter Behavioral Health Sys.,* 242 F.3d 610, 613 (5th Cir. 2001); 42 U.S.C. § 12102(2). Each of the statutory definitions will be considered in turn.

1) *Substantially Limiting Impairment*

In proceeding under the first definition of "disability," Plaintiff would have to show the injuries she suffered as a result of her accident substantially limited "one or more of the major life activities." *Id.* "Major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 163.02(h)(2)(i). Plaintiff alleges in her complaint that the injuries she sustained in the automobile accident caused "physical and mental impairments that: (a) limit her ability to travel long distances every day, and (b) impair her ability to work in a constantly changing physical work environment." *See* Plaintiffs' [sic] Original Complaint at ¶ 15. In Plaintiff's Response to Defendant's Motion for Summary Judgment, she seemingly abandons these allegations and instead alleges that as a result of her accident, she suffers from a cognitive brain disorder that impairs her ability to learn and affects her memory. Therefore, assuming Plaintiff's injuries limit her ability to travel long distances, impair her ability to work in a constantly changing physical work environment or impair her ability to learn, in order for Plaintiff to meet the first prong of her disability claim, she must show (1) that at least one of these activities is a "major life activity," and (2) that her ability to perform such activit(ies) is substantially limited. *Dupre,* 242 F.2d at 613.

Plaintiff first asserts that her ability to travel long distances is impaired by her injuries. This assertion does not support Plaintiff's claim. Driving is not recognized as a major life activity. *Middleton v. Ball-Foster Glass Container Co.*, 139 F.Supp.2d 782, 794 (N.D. Tex. 2001). Even if driving was a major life activity, Plaintiff was not

substantially limited in her ability to drive. Plaintiff states in her deposition testimony that she is able to drive herself, but she cannot face the stress of the traffic. Deposition of Sharon J. Zimmer ("Zimmer Depo.") at 73:10-11; 111:21-22. Plaintiff's discomfort with driving in traffic is not sufficient to meet the first prong of her disability claim as a matter of law.

Plaintiff also asserts that her injuries impair her ability to work in a constantly changing physical work environment. For purposes of analysis, the Court will assume that Plaintiff is alleging that she is substantially limited in the major life activity of working. To be substantially limited in the major life activity of working, the Plaintiff must be

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). Under the ADA, working "does not mean working at a particular job of that person's choice." *Wooten v. Farmland Foods,* 58 F.3d 382, 386 (8th Cir. 1995). Plaintiff herself testified that she was able to perform all the duties of her job just as well after her accident as she did before the accident. Zimmer Depo. at 75:4-8. Plaintiff testified that she had no problems in keeping up with the volume of calls or in processing customer orders. *Id.* at 75:9-14. Further, Plaintiff testified that she could type on a keyboard, answer customers' questions, dress herself and drive herself. *Id.* at 72:21-73:11. In fact, Plaintiff testified that after her accident

"once [she] [sat] down at the position, it just all fell into place." *Id.* at 75:19-20. The summary judgment evidence conclusively establishes that Plaintiff was not substantially limited in the major life activity of working because she was able to perform all aspects of her job as well after her impairment as she did before she became impaired.

In Plaintiff's Response, she seemingly abandons her claims that she is substantially limited in the major life activities of driving and working. Instead, she claims for the first time in her response that she is substantially limited in the major life activity of learning. The Court considers this claim that Plaintiff suffered from a learning disability for the first time in her response to Southwestern Bell's Motion for Summary Judgment as a motion to amend her Original Complaint. *Ganther v. Ingle*, 75 F.3d 207, 211 (5th Cir. 1996). The decision to permit or deny a motion to amend is within the court's discretion and "is reversible only for abuse of that discretion." *Overseas Inns S.A.P.A. v. United States,* 911 F.2d 1146, 1150 (5th Cir. 1990). In making this determination, the court may consider the following factors: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. . . ." *Id.* The Court finds that it would unduly prejudice Southwestern Bell if Plaintiff were allowed to amend her complaint at this time. Plaintiff first alleged that she was substantially limited in the life activity of learning in her response to Southwestern Bell's Motion for Summary Judgment. "To grant [Plaintiff] leave to amend is potentially to undermine [Southwestern Bell's] right to prevail on a motion that necessarily was prepared without reference

to an amended complaint . . . A party should not, without adequate grounds, be permitted to avoid summary judgment by the expedient of amending its complaint." *Id.* at 1151. Accordingly, Plaintiffs claim that she suffered from a learning disability should not be allowed.

Assuming *arguendo* that Plaintiffs claim that she was substantially limited in the major life activity of learning as timely asserted, the Court will analyze this claim under the applicable law. Learning is included in the definition of major life activity under the ADA. 29 C.F.R. § 1630 2(h)(2)(i). Whether an impairment is substantially limiting depends on "(1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent long-term impact." 29 C.F.R. § 1630, App. § 1630.2(j).

Plaintiff testified in her deposition that due to a cognitive brain disorder caused by her accident, she has long-term and short-term memory loss and is unable to learn new things. Zimmer Depo. at 70:20-22; 71:4-6; 71:10-14. But Plaintiffs learning disability did not affect her job performance at Southwestern Bell. In fact, Plaintiff testified "[a]s far as my ability to do what I have done in the past, I'm capable of doing [sic]. I did do it when I went back to work with Southwestern Bell." *Id.* at 72:17-20. The position offered to Plaintiff in the Dallas facility, directory assistance operator, was the same position she held at all times while she worked in the McKinney facility. According to Plaintiff's own testimony, she did not consider her cognitive brain disorder to be any particular problem on the job. Therefore, she is not disabled under the ADA. *Sherman v. Optical Imaging Systems, Inc.*, 843 F.Supp. 1168, 1181 (E.D. Mich. 1994). Further, Plaintiff presented

no other evidence of the existence of her condition or its substantial impairment of major life activities.

Plaintiff apparently tries to argue that she is substantially limited in the major life activity of learning in that she would be unable to drive to a new facility in Dallas. But Plaintiff testified that she could usually reach her destination if she followed directions. *Id.* at 117:17-19. Plaintiff further stated that she sometimes gets "turned around" in areas with which she is already familiar. *Id.* Plaintiff discusses at length that she is unable to drive to the downtown Dallas location because the traffic encountered on the drive causes her stress, but she has failed to show how the traffic-induced stress is even related to her learning disability. Further, in the event that Plaintiff could somehow tie her stress to her claimed learning disability, she has failed to show that she is significantly restricted by her learning disability as compared with the average person. *See Dupre,* 242 F.3d at 614 (finding that the "condition, manner, or duration" under which the plaintiff was able to sit or stand was not significantly restricted as compared to the average person). To constitute a substantial limitation on a major life activity, Plaintiffs ability to learn must be *significantly* limited as compared with the average person.

In this case, Plaintiff has failed to produce evidence that she was "substantially limited" in her ability to learn. Although Plaintiff stated that she has a cognitive brain disorder that prevents her from learning new things and claims her doctor told her that she could not drive to downtown Dallas because it would cause Plaintiff stress, Plaintiff does not indicate precisely in what manner or to what extent her ability to learn has been substantially limited. In addition, Plaintiff has not proffered evidence

regarding the nature and severity, duration or long-term possible impact of her injuries. Because Southwestern Bell's McKinney facility was closed, Plaintiff would inevitably be required to travel a new route to work. Plaintiff testified that she could usually find a destination with directions. Plaintiff, therefore, has not shown that she was substantially limited in the major life activity of learning. Accordingly, she is not disabled within the meaning of 42 U.S.C. § 12102(2)(A).

2) *Record of Impairment*

While the ADA does not define "record of impairment," the EEOC regulations provide that "record of impairment" means "has a history of, or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). Therefore, not only must Plaintiff establish that she has a record of an injury or impairment, but the evidence must show that her impairment substantially limited a major life activity. *Dupre,* 242 F.3d at 615 (citing *Sherrod v. American Airlines,* 132 F.3d 1112, 1120-21 (5th Cir. 1998)) (citation omitted). Plaintiff has presented no evidence to the Court that would establish a record of impairment. Further, this Court has already determined that Plaintiff is not substantially limited in the life activities of working or learning. Accordingly, Plaintiff does not have a record of impairment under the ADA.

3) *Regarded as Disabled*

Even if Plaintiff does not suffer from an "actual" disability, she may still recover under the ADA if her employer "regarded" her as being disabled. *McInnis v.*

Alamo Community College Dist., 207 F.3d 276, 281 (5th Cir. 2000); 42 U.S.C. § 12102(2)(c). In order for Plaintiff to be "regarded as" being disabled, she must: (1) have a physical or mental impairment that does not substantially limit major life activities, but be treated as such by an employer; (2) have a physical or mental impairment that substantially limits one or more major life activities only because of the attitudes of others toward the impairment; or (3) have none of the defined impairments, but be treated by an employer as having a substantially limiting impairment. *Sherrod,* 132 F.3d at 1121. Plaintiff must show that the impairment existed as perceived, would be substantially limiting. *Deas v. River West, L.P.,* 152 F.3d 471, 480 n.20 (5th Cir. 1998). "Simple awareness of the impairment, however, real or perceived, is insufficient to prove that the employer regarded the employee as disabled." *EEOC v. Exxon Corp.,* 124 F.Supp.2d 987, 998 (N.D Tex. 2000) (citations omitted).

> Plaintiff cannot state a claim under the "regarded as" prong of the ADA simply by alleging that the employer believes some physical condition, such as height, weight, or hair color, renders the plaintiff disabled. Rather, the plaintiff must allege that the employer believed, however erroneously, that the plaintiff suffered from an "impairment" that, if it truly existed, would be covered by the statute and that the employer discriminated against the plaintiff on that basis.

Heyman v. Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc., 198 F.3d 68, 73 (2d Cir. 1998). Plaintiff bears the burden of proving that she is or was regarded as substantially limited in a major life activity. *Id.* (citing *Sherrod,* 132 F.3d at 1120).

Plaintiff has failed to present any record evidence on this issue. Rather, Plaintiff argues that because Southwestern Bell allowed her to stay at one station instead of rotating from station to station, she was regarded as disabled. Plaintiff testified that she was allowed to stay in one station because she had difficulty adjusting her position by turning a knob with her left hand. This testimony falls far short of record evidence that Southwestern Bell regarded Plaintiff as disabled. Southwestern Bell's awareness that Plaintiff had difficulty turning the knob to adjust her position is not evidence that she was treated as having a mental or physical impairment by Southwestern Bell. In fact, Plaintiff testified that she performed her job as well after her accident as she had before her accident. Neither has Plaintiff presented any evidence that she was substantially impaired in any major life activity because of the attitudes of others toward her impairment. Finally, Plaintiff has not presented any evidence that she was treated as though she had a substantially limiting impairment. Accordingly, the evidence is insufficient to support a claim that Southwestern Bell regarded Plaintiff as having a disability.

B. Qualified Individual with a Disability

The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(g). Plaintiff testified in her deposition that she could perform her job just as well after her accident as she did before she became impaired. Plaintiff simply claims she is unable to drive into Dallas because it would cause her stress. If a disabled individual

is unable to meet the requirements of her job for reasons other than her disability, she is not a "qualified individual" under the ADA and is not entitled to accommodation. *Dowden v. Tisch*, 729 F.Supp. 1137, 1138 (E.D. Tex. 1989), *aff'd*, 902 F.2d 957 (5th Cir. 1990). Southwestern Bell does not dispute that Plaintiff was able to perform the essential functions of a directory assistance operator. However, because the Court has previously determined that Plaintiff is not disabled under the ADA, she does not meet the definition of a "qualified individual with a disability."

C. Adverse Employment Action

Even assuming Plaintiff has satisfied her burden to show that she is a qualified individual with a disability, summary judgment is appropriate due to the absence of evidence regarding an adverse employment decision made on account of Plaintiff's alleged disability. Generally, adverse employment decisions include ultimate employment decisions such as hiring, firing, granting leave, promoting and compensating. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). The ADA does not protect employees with disabilities from *all* adverse employment decisions; only from those decisions motivated by discrimination. *Armstrong v. Turner Indus. Inc.*, 141 F.3d 554 (5th Cir. 1998). Under the ADA, the employee bears the burden of proving the employer's actions were motivated by discrimination. *Hypes on Behalf of Hypes v. First Commerce Corp.*, 134 F.3d 721, 726 (5th Cir. 1998).

Plaintiff took a short-term disability leave of absence due to stress and anxiety she claims to have suffered as a result of a receiving a DML on December 7, 1997. Plaintiff never returned to work. In January of 1999, Plaintiff

retired and began receiving long-term disability benefits, which pay her a monthly benefit and lifetime medical and dental benefits. Zimmer Depo. 56-59. Southwestern Bell did not terminate Plaintiff's employment.

Plaintiff appears to argue that she suffered an adverse employment action because Southwestern Bell failed to accommodate her cognitive brain disorder. Southwestern Bell closed its McKinney call center and subsequently offered Plaintiff the position of directory assistance operator at its Dallas call center.[2] Plaintiff argues that by offering her a position in the Dallas call center, Southwestern Bell constructively discharged her. A constructive discharge occurs when an employer makes an employee's working conditions so intolerable that a reasonable employee would feel forced to resign. *Benningfield v. City of Houston,* 157 F.3d 369, 378 (5th Cir. 1998); *Barrow v. New Orleans S.S. Ass'n,* 10 F.3d 292, 298 (5th Cir. 1994); *Boze v. Branstetter,* 912 F.2d 801, 804 (5th Cir. 1990); *Young v. Southwestern Sav. & Loan Ass'n,* 509 F.2d 140, 144 (5th Cir. 1975). When determining whether the Plaintiff was constructively discharged, her actions must be analyzed from the standpoint of a "reasonable employee." *Boze,* 912 F.2d at 804; *Bourque v. Powell Elec. Mfg. Co.,* 617 F.2d 61, 65 (5th Cir. 1980). "The working conditions must have been 'so difficult or unpleasant that [a] reasonable person in [the plaintiff's] shoes would have felt compelled to resign.'" *Suttles v. United States Postal Service,* 927

[2] Plaintiff held the position of directory assistance operator while working at the McKinney call center; therefore, Southwestern offered her the exact same position that she previously held, which would prevent Plaintiff from being required to learn a new position. Plaintiff claims that she is unable to learn anything new due to her learning disability.

F. Supp. 990, 1011 (S.D. Tex. 1996) (citing *McKethan v. Texas Farm Bureau,* 996 F.2d 734, 741 (5th Cir. 1993), *cert. denied,* 510 U.S. 1046, 114 S.Ct. 694 (1994) (citation omitted)). The following factors are relevant, either individually or in combination, to the inquiry of whether a reasonable employee would feel compelled to resign:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000); *Barrow,* 10 F.3d at 297 and n. 20.

Plaintiff essentially argues that she was constructively discharged because Southwestern Bell reassigned her to a position in Dallas after the McKinney call center closed. She claims that this reassignment fails to accommodate her disability because the drive into downtown Dallas would cause her stress. However, Plaintiff has failed to present any evidence that her working conditions were intolerable. In fact, Plaintiff never returned to work after she went on short-term disability in December of 1997. She was offered the exact same position in Dallas that she held in McKinney. Accordingly, she was not demoted and she has not presented any evidence that her salary or her responsibilities were reduced. In *Bristow v. Daily Press, Inc.,* 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied,* 475 U.S. 1082, 106 S.Ct. 1461 (1986) (citation omitted), the Fourth Circuit stated:

> Every job has its frustrations, challenges, and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress.

Plaintiff has failed to present any evidence that Southwestern Bell made a calculated effort to pressure her into retirement. Further, Plaintiff's claim that Southwestern Bell failed to accommodate her by only offering her a position in the Dallas call center has no merit. Plaintiff now claims that she suffers from a learning disability; however, the stress caused by driving into Dallas is unrelated to her alleged learning disability. The ADA requires employers to accommodate disabilities, but it does not require employers to accommodate deficiencies that are unrelated to the employee's infirmity. *Bowers v. Bethany Medical Ctr.*, 959 F.Supp. 1385, 1391 (D. Kan. 1997).[3] Accordingly, Plaintiff has failed to present any evidence that she suffered an adverse employment action, and Southwestern Bell's motion should be granted as a matter of law.

C. Less Favorable Treatment Toward Plaintiff

The final element of a disability discrimination claim is for Plaintiff to show she was replaced by or treated less

---

[3] If a disabled individual is unable to meet the requirements of her job for reasons other than her disability, she is not a "qualified individual" under the ADA and is not entitled to accommodation. *Dowden v. Tisch*, 729 F.Supp. 1137, 1138 (E.D. Tex. 1989), *aff'd*, 902 F.2d 957 (5th Cir. 1990).

favorably than non-disabled employees. *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000). Plaintiff has not alleged that she was replaced by a non-disabled employee. Therefore, for Plaintiff to satisfy the last element of her claim, she must show that she was treated less favorably than non-disabled employees. This she has failed to do. Plaintiff has not presented any summary judgment evidence to suggest that she was treated less favorably than non-disabled employees.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment should be Granted.

IT IS SO ORDERED.

Signed this the 5th day of January, 2004.

/s/ Paul Brown
SENIOR UNITED
STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHARON J. ZIMMER,	§	
	§	
v.	§	NO. 4:01-CV-139
	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion and Order of even date herewith, it is hereby

ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment is granted, and this case is dismissed with prejudice. It is further

ORDERED and ADJUDGED that Defendant shall recover from Plaintiff its costs of court. It is further

ORDERED AND ADJUDGED that all relief requested by any party not granted herein is hereby denied.

SIGNED this 5th day of January, 2004.

/s/ Paul Brown
SENIOR UNITED
STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40141

SHARON J ZIMMER

Plaintiff-Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas, Sherman

(Filed Oct. 1, 2004)

ON PETITION FOR REHEARING

Before STEWART and DENNIS, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

---

* This order is being entered by a quorum of this court pursuant to U.S.C. Section 46(d).

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

APPENDIX E

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

[SEAL]

207 S. Houston, 3rd Floor
Dallas, Texas 75007
PH: (214) 655-3323
TDD: (214) 655-3363
FAX: (214) 655-3443

Charge No. 310 99 1151

Sharon J. Zimmer - Charging Party
630 Bandera Street
McKinney, Texas 75070

vs.

Southwestern Bell Telephone Company Respondent
307 N. Kentucky
McKinney, Texas 75070

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title I of the Americans With Disabilities Act of 1990.

All requirements for coverage have been met. Charging Party alleged that she was discriminated against in violation of Title I in that she was denied a reasonable accommodation from approximately March 1998 to January 1999 and by being terminated from her employment or about January 1999 because of her disability, because of being perceived/regarded as being disabled or because of having a record of a disability.

During the investigation, relevant, available witnesses were interviewed, and relevant documents were reviewed. I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of Title I of the Americans With a Disabilities Act of 1990.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The Commission will also consider compensatory and punitive damages under the Civil Rights Act of 1991.

If the Respondent declines to discuss settlement or if, for any other reason, a settlement acceptable to the Office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On behalf of the Commission

/s/ Janet V. Elejando
Chester V. Bailey
District Director

Oct. 12, 2000
Date

APPENDIX F

PART LVII

DISABILITY: APPENDICES

APPENDIX 70

AMERICANS WITH DISABILITIES ACT (ADA) (42 U.S.C. §§ 12101 *et seq.*)

The Americans With Disabilities Act Title 42, United States Code

Chapter 126 – Equal Opportunity for Individuals with Disabilities

§ 12101. Findings and purposes.

§ 12102. Definitions. § 12111. Definitions.

SUBCHAPTER I – EMPLOYMENT

§ 12112. Discrimination.

§ 12113. Defenses.

§ 12114. Illegal use of drugs and alcohol.

§ 12115. Posting notices.

§ 12116. Regulations.

§ 12117. Enforcement.

SUBCHAPTER II – PUBLIC SERVICES

Division A – Prohibition Against Discrimination and Other Generally Applicable Provisions

§ 12131. Definitions.

§ 12132. Discrimination.

§ 12133. Enforcement.

§ 12134. Regulations.

Division B – Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

Part I – Public Transportation Other Than by Aircraft or Certain Rail Operations

§ 12141. Definitions.

§ 12142. Public entities operating fixed route systems.

§ 12143. Paratransit as a complement to fixed route service.

§ 12144. Public entity operating a demand responsive system.

§ 12145. Temporary relief where lifts are unavailable.

§ 12146. New facilities.

§ 12147. Alterations of existing facilities.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule.

§ 12149. Regulations.

§ 12150. Interim accessibility requirements.

Part II – Public Transportation by Intercity and Commuter Rail

§ 12161. Definitions.

§ 12162. Intercity and commuter rail actions considered discriminatory.

§ 12163. Conformance of accessibility standards.

§ 12164. Regulations.

§ 12165. Interim accessibility requirements.

SUBCHAPTER III – PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

§ 12181. Definitions.

§ 12182. Prohibition of discrimination by public accommodations.

§ 12183. New construction and alterations in public accommodations and commercial facilities.

§ 12184. Prohibition of discrimination in specified public transportation services provided by private entities.

§ 12185. Study.

§ 12186. Regulations.

§ 12187. Exemptions for private clubs and religious organizations.

§ 12188. Enforcement.

§ 12189. Examinations and courses.

SUBCHAPTER IV – MISCELLANEOUS PROVISIONS

§ 12201. Construction.

§ 12202. State immunity.

§ 12203. Prohibition against retaliation and coercion.

§ 12204. Regulations by the Architectural and Transportation Barriers Compliance Board. § 12205. Attorney's fees.

§ 12206. Technical assistance.

§ 12207. Federal wilderness areas.

§ 12208. Transvestites.

§ 12209. Instrumentalities of the Congress.

§ 12210. Illegal use of drugs.

§ 12211. Definitions.

§ 12212. Alternative means of dispute resolution.

§ 12213. Severability.

§ 12101. Findings and purposes

(a) Findings. The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers,

overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose.** It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) **Auxiliary aids and services.** The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) **Disability**. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) **State.** The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I – EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) **Commission.** The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-4).

(2) **Covered entity.** The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **Direct threat.** The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **Employee.** The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) **Employer.**

(A) **In general.** The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **Exceptions.** The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) **Illegal use of drugs.**

(A) **In general.** The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. § 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) **Drugs.** The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812].

(7) **Person, etc.** The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e).

(8) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) **Reasonable accommodation.** The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **Undue hardship.**

(A) **In general.** The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **Factors to be considered.** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) **General rule.** No covered entity shall discriminate against a qualified individual with a disability because

of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction.** As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) **Covered Entities in Foreign Countries.**

(1) **In general.** It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) **Control of corporation.**

(A) **Presumption.** If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) **Exception.** This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer_.

(C) **Determination.** For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) **Medical examinations and inquiries.**

(1) **In general.** The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) **Preemployment.**

(A) **Prohibited examination or inquiry.** Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) **Acceptable inquiry.** A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) **Employment entrance examination.** A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) **Examination and inquiry.**

(A) **Prohibited examinations and inquiries.** A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **Acceptable examinations and inquiries.** A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) **Requirement.** Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses.

(a) **In general.** It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) **Qualification standards.** The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) **Religious entities.**

(1) **In general.** This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) **Religious tenets requirement.** Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) **List of infectious and communicable diseases.**

(1) **In general.** The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall –

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public. Such list shall be updated annually.

(2) **Applications.** In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) **Construction.** Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) **Qualified individual with a disability.** For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **Rules of construction.** Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) **Authority of covered entity.** A covered entity –

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that –

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if

the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) **Drug testing.**

(1) **In general.** For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) **Construction.** Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) **Transportation employees.** Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to –

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-10).

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement

(a) **Powers, remedies, and procedures.** The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) **Coordination.** The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. §§§ 701 *et seq.]* shall develop procedures to ensure that administrative complaints filed under

this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

SUBCHAPTER II – PUBLIC SERVICES

Division A – Prohibition Against Discrimination and Other Generally Applicable Provisions

§ 12131. Definition

As used in this subchapter:

(1) **Public entity.** The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [45 U.S.C. § 502(8)]).

(2) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations

in an accessible format that implement this division. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) **Relationship to other regulations.** Except for "program accessibility", "existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) **Standards.** Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this division, other than facilities, stations, rail passenger cars, and vehicles covered by division B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Division B – Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

Part I – Public Transportation Other Than by Aircraft or Certain Rail Operations

APPENDIX G

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.	AGENCY ☐ FEPA ☒ EEOC	CHARGE NUMBER 310991151

Texas Commission on Human Rights and EEOC
State or local Agency, if any

NAME (*Indicate Mr., Ms., Mrs.*) Ms. Sharon J. Zimmer	HOME TELEPHONE (*Include Area Code*) (972) 562-1602
STREET ADDRESS – CITY, STATE AND ZIP CODE 630 Bandera Street, Mc Kinney, TX 75070	DATE OF BIRTH 10/08/1951

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.*)

NAME Southwestern Bell Telephone Co.	NUMBER OF EMPLOYEES, MEMBERS Cat D (501 +)	TELEPHONE (Include Area Code) (972) 562-0169
STREET ADDRESS – CITY, STATE AND ZIP CODE 307 N. Kentucky, Mc Kinney, TX 75070		COUNTY 085
NAME Southwestern Bell Telephone Co.		TELEPHONE NUMBER (*Include Area Code*) (214) 464-8888
STREET ADDRESS – CITY, STATE AND ZIP CODE Three Bell Plaza, 3208 S. Akard St., Dallas, Tx. 75202		COUNTY

CAUSE OF DISCRIMINATION BASED ON (*Check appropriate box(es)*)	DATE DISCRIMINATION TOOK PLACE
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☒ DISABILITY ☐ OTHER (Specify)	*EARLIEST* *03/01/1998* *LATEST* *01/31/1999* ☐ CONTINUING ACTION

THE PARTICULARS ARE (*If additional space is needed, attach extra sheet (s)*):

I. A. From approximately March 1998 to January 1999, I was denied a reasonable accommodation for my disability.

B. On or about January 1999, I was terminated from my position of Operator Services 1-411 by Ms. Linda Beard, Manager Operator Services, and Mr. Lou Williams, Area Manager Operator Services.

II. A. The reason I was given for the denial of a reasonable accommodation was that I could not be accommodated. No other reason(s) were given for the denial of a reasonable accommodation.

B. No reason(s) were given to me for the termination of my employment.

III. I believe I have been discriminated against because of my disability, because I was regarded as disabled and/or because of my record of disability, in violation of Title I of the Americans with Disabilities Act of 1990.

☐ I want this charge filed with both the EEOC and the state or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY (When necessary for State and Local Requirements) I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
I declare under penalty of perjury that the foregoing is true and correct. Date 03-11-99 Sharon J. Zimmer Charging Party (*Signature*)	SIGNATURE OF COMPLAINANT /s/ Sharon J. Zimmer SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month and year) 11 Mar. 99, [Illegible]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

SHARON J. ZIMMER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:01cv139
	§	
SOUTHWESTERN BELL TELEPHONE COMPANY,	§	
	§	
	§	
Defendant.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

1. Comes now Sharon J. Zimmer, an individual ("Plaintiff" or "Zimmer") complaining of Southwestern Bell Telephone Company, ("Defendant") and seeking to be reinstated as an employee and to recover damages Zimmer sustained when Defendant willfully violated the Americans With Disabilities Act ("ADA ") as amended, 42 U.S.C. § 11101 *et, seq.* and would show the Court the following:

I.

Venue and Jurisdiction

2. Venue is proper in Collin County, Texas pursuant to 28 U.S.C. § 1391(b)(2) insofar as the Plaintiff resides in Collin County and all or a substantial part of the events or omissions giving rise to the claim occurred in Collin County.

3. Jurisdiction of this Court is invoked pursuant to the Americans With Disabilities Act ("ADA") 42 U.S.C. §§12111(5)(a), 12112(b)(5), and 12117(a). This is a suit

authorized and instituted pursuant to the ADA seeking injunctive, declaratory, and other equitable and legal relief against Defendants.

II.

Parties

4. Plaintiff, Sharon J. Zimmer, resides in McKinney, Collin County, Texas.

5. Plaintiff is a former employee of Defendant who worked for the Defendant in Tulsa, Oklahoma and McKinney, Texas.

6. In McKinney, Texas, Zimmer worked as an information operator.

7. Defendant, Southwestern Bell Telephone Company is a Missouri corporation registered and authorized to do business in Texas. Defendant Southwestern Bell Telephone Company may be served by serving its registered agent David Welsh, Southwestern Bell Telephone Company at 1 Bell Plaza, Room 2900, Dallas, Texas 75202. Defendant committing willful violations of the ADA within said district.

8. Pursuant to §102 of the ADA, 42 U.S.C. §12112, Plaintiff brings this action.

III.

Allegations

9. Plaintiff began working for Defendant in Tulsa, Oklahoma in 1973.

10. Plaintiff worked for Defendant in Oklahoma for approximately 13 years, from 1973 to 1987.

11. Plaintiff again sought employment with Defendant after moving to North Texas.

12. Defendant again employed plaintiff in North Texas, beginning in 1994 at its McKinney call center.

13. Sharon Zimmer continued to be actively employed by Defendant at its McKinney call center from the date of her reemployment until February 1, 1996 when she was involved in a near fatal automobile accident in which her car rolled over and down an embankment in the vicinity of LBJ and Central Expressway.

14. The automobile accident caused Zimmer to be severely injured and unable to return to work until September of 1996. Zimmer was hospitalized and in a coma for approximately 27 days at Parkland Hospital and thereafter was treated on an in-patient basis at Plano Rehabilitation Hospital, a rehabilitation facility, for an additional continuous period of approximately three (3) months.

15. As a result of the severe injuries sustained in the automobile accident Sharon Zimmer became permanently disabled and a "qualified individual with a disability" as defined at §101, 42 USC §12102(8). Sharon Zimmer's disabilities consist of both physical and mental impairments that: (a) limit her ability to travel long distances every day, and (b) impair her ability to work in a constantly changing physical work environment. Sharon Zimmer initially lost substantial use of and mobility of her left side of her body. Her mental impairment resulting from the severe brain injury sustained in the automobile

accident, along with certain physical impairments likewise sustained, makes it very difficult for her to perform her job without certain modest "reasonable accommodations."

16. According to Southwestern Bell Telephone Company's avowed policy it is committed to employing diverse persons, which include those who have disabilities and must, according to the ADA, afford employees who request reasonable accommodations provide such accommodations and employ such persons without discrimination.

17. From approximately September 1996 to December 1997 Defendant made it possible, through reasonable accommodations, for Plaintiff to return to work at their McKinney location. The Defendant's ability to employ Plaintiff during such period evidences the absence of any undue hardship to Defendant in allowing Sharon Zimmer to work at one permanent work station in their McKinney facility.

18. The reasonable accommodation was merely that Plaintiff was permitted to utilize the same work station each day she reported to her job, which she did regularly with little if any complaint as to her conduct while employed by Defendant.

19. By allowing Plaintiff to use one workstation and not cycle her to different workstations, Plaintiff's workstation could be left in a configuration that suited the physical impairments Plaintiff suffered.

20. Further, by being able to work at the same work station, Plaintiff was afforded the ability to work without encountering certain added psychological and emotional

stress that working at a different work station each day caused to a person with her disabilities.

21. While the stress associated with a different work station each day might not be difficult for a person without Plaintiff's disability, she in fact does suffer severe stress and trauma if made to work at different and sometimes more distracting work stations, all as a result of the disabling brain injury, suffered in the automobile accident.

22. Defendant owns and operates call centers located in Texas, Oklahoma and other states throughout the region.

23. Plaintiffs worked as an information operator (1-411) answering telephone inquiries from customers and providing telephone numbers when possible to members of the public.

24. At all pertinent times, Defendant is an employer engaged in an industry affecting commerce and with more than the minimum number of employees required to be subject to the ADA under §101 of the ADA, 42 U.S.C. §12111(5)(A) and who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, the later being relevant to the determination of the maximum compensatory damage award under § 42 USCA § 1981a(b).

25. When Zimmer came back to work at Southwestern Bell, they found it no undue hardship to make modest reasonable accommodations for Plaintiff, by allowing her to work at the same work station without her having to pick whatever free station was otherwise available, as was the customary practice for similar non-disabled operators.

26. Consequently, Defendants were aware that the Plaintiff requested and needed "reasonable accommodations" as contemplated in the ADA.

27. However, thereafter Defendant refused to continue to provide the modest and very reasonable accommodations that would permit Ms. Zimmer to continue to work as an information operator (1-411) at their McKinney call center.

28. By refusing to continue to afford Ms. Zimmer such modest reasonable accommodations and instead telling her she could only continue to work at Southwestern Bell if she were willing to change work locations and work at a much more distant call center, Southwestern Bell Telephone Company knowingly and willfully allowed the Plaintiff's supervisors to disregarded [sic] their obligations under the ADA.

29. Defendants' unlawful and intentional refusal to continue to provide Plaintiff reasonable accommodations at their McKinney call center and to suggest that she could only keep her job with Defendant if she transferred her employment to a different call center which would necessitate that she either drive or take public transportation many miles from her home, a home which she purchased near her then existing place of employment with Southwestern Bell Telephone within 5 minutes of the McKinney facility, constituted constructive discharge and an unlawful and intentional violation of the ADA, thereby making Defendant liable for such legal and equitable relief as may be appropriate.

30. Because Defendant's acts were intentional and were conducted either with malice or with reckless indifference to the federally protected rights of Plaintiff,

Plaintiff is also entitled to additional compensatory and punitive damages pursuant to the Civil Rights Act of 1991, 42 USC §1981a(a)(2) and (b).

31. Plaintiff filed a complaint against the Defendant with the Equal Employment Opportunity Commission ("EEOC"), the Federal Agency charged with investigating cases of discrimination under various laws including the ADA.

32. The EEOC issued Plaintiff a "Right To Sue" letter containing a finding of "reasonable cause to belief that" Defendant violated the Americans with Disabilities Act.

33. Plaintiff brings this lawsuit within the 90-day time limit set forth in the EEOC's Right to Sue letter, a copy of which is attached hereto.

Jury Demand

34. Zimmer requests that all issues of fact be tried before a jury.

Prayer

35. WHEREFORE, Plaintiff respectfully prays this Court grant the following:

1. A permanent injunction enjoining Defendant, its agents and employees from refusing to employ Plaintiff as an information operator (1-411) at their McKinney call center located in McKinney, Texas 75070;

2. To issue a declaratory judgment declaring Defendant's past practices as set forth herein to be in violation of 42 U.S.C. §12101;

3. Payment of all past due wages to Plaintiff, together with interest thereon, and an additional amount of compensatory and punitive damages in accordance with the Civil Rights Act of 1991;

4. All costs of court and reasonable attorneys' fees; and

5. Such other and further legal or equitable relief to which Plaintiff may be justly entitled.

Dated this 20th day of April, 2001.

Respectfully submitted,

By: /s/ Eric G. Calhoun
Eric G. Calhoun
State Bar No. 03638800
Gary B. Lawson
State Bar No. 12058490

Lawson and Fields, P.C.
5323 Spring Valley Road,
Suite 300
Dallas, Texas 75240
972.661.5323
972.661.5177 (Facsimile)
Attorney for Plaintiff

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Conciliation Failure)

To: Sharon Zimmer 630 BANDERA STREET MC KINNEY, TX 75070	From: EQUAL EMPLOYMENT OPP. COMM. Dallas District Office 207 S. Houston St. Dallas TX 75202

☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
310991151	Armando Matamoros	(214) 655-3397

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

– NOTICE OF SUIT RIGHTS –

(See the additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS from your receipt of this Notice**; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. **This means that backpay due for any violations that occurred *more than 2 years (3 years)* before you file suit may not be collectible.**

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ Janet V. Eljando/[Illegible] — JAN 23 2001
Chester V. Bailey, Director — (*Date*)

Enclosure(s)

cc: SOUTHWESTERN BELL TELEPHONE CO
307 N. KENTUCKY
MC KINNEY, TX 75070

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHARON J. ZIMMER,	§	
Plaintiff,	§	**CAUSE NO. 4:01CV139**
v.	§	**JURY**
SOUTHWESTERN BELL TELEPHONE COMPANY,	§	**Brown**
Defendant.	§	

AFFIDAVIT OF DOMINGO GONZALES, JR.

STATE OF TEXAS)
:ss.
COUNTY OF DALLAS)

Before me, the undersigned authority, personally appeared **Domingo Gonzales, Jr.,** who being by me duly sworn, deposed as follows:

"My name is **Domingo Gonzales, Jr.** I am over the age of eighteen (18) years, of sound mind, capable of making this Affidavit, and am personally acquainted with the facts herein stated:

1. "I am currently employed by Southwestern Bell Telephone, L.P., as an Area Manager, Administration, in the group that provides the human resources function for directory assistance operations.

2. "As a part of my job duties, I am the custodian of records for personnel files of directory assistance operators, including formerly employee Sharon J. Zimmer.

Attached hereto are five (5) pages of records from Ms. Zimmer's personnel file.

Further affiant sayeth not.

Domingo Gonzalez Jr.
DOMINGO GONZALEZ, JR.

SUBSCRIBED AND SWORN TO before me,
a notary public, this 28th day of August, 2003,
which witness my hand and official seal.

[SEAL]	MEGAN RILEY Notary Public, State of Texas My Commission Expires 09-15-04

/s/ Megan Riley
Notary Public for the State of Texas

My Commission Expires:
September 15, 2004

Positive Discipline

Employee Name: ZIMMER, SHARON
Opr#: 1185
SSN:447543608
Title: OPERATOR
NCS Date: 05/17/1993
Office: MCKINNEY

Is employee currently on an active level of Positive Discipline? No

	Category	Activation Date	Deactivation Date
Oral Written DML			

This Discussion:	Date:	Location:
	DEC 7 97 07:26	307 N. KENTUCKY

PD Step	Category	Activation Date	Deactivation Date
DML	CONDUCT	DEC 7 97 00:00	DEC 7 98 00:00

Manager(s) Present: Lynda Beard

Union Representation Offered? Yes

Union Representative(s) Present: Brenda Darling and Debbie Wilburn

Standards/Requirements:

To conduct one's self in an appropriate manner by complying with the Code of Business and office guidelines and procedures.

Current Status:

Ms. Zimmer's conduct on 11/27/97 caused a disturbance in the office which affected customer service.

Commitment:

Confidence Expressed:

General Discussion:

I met with Ms. Zimmer and explained this was to be a disciplinary meeting. I stated that from the results of our investigation of the events of 11/27/97, she was being placed on a Decision Making Leave. I stated her behavior had created

an office disturbance, causing customer service to be affected. I had explained there had been several occassions during her career where she had not followed office or company guidelines. I gave the following examples:

Signing of E-List out of order
Eating and drinking at position
Applying makeup and cologne at position
Conducting personal business with a customer

Ms. Zimmer asked why she was in trouble, stating she had done nothing wrong. I again emphasized the disturbance she had caused in the office on Thanksgiving evening. Ms. Zimmer stated she had not caused a disturbance because she could not talk in a loud voice. She began talking about her position and how it had been promised to her by Danny (White) and Roy (Baltazar). She asked if she did not have a right to her position due to her handicap. I explained this was not the issue at this time and we would discuss it at a later time.

I asked Ms. Zimmer if she understood what a DML was and she was unsure. I explained tht the DML was a paid leave of one day for an employee to go home and think about whether they wanted to keep their job and if they were able to meet the requirements of the job. I stated that on her next day scheduled, Tuesday, December 9 at 9:00am, she would return and give me her decision. I asked the accomodation question verbatim:

"Is there anything I or you can do, or provide, to accommodate or assist you in improving your performance?" She again began talking about her position. I told her that upon her return, if she

decides to remain employed, I would help her fill out an Accommodation Request, and explained that the decision would be made outside of our office. At this point she put her head on the table and began crying. I asked if she needed time to talk to her Union representative and the Chief Steward said she would like a few minutes. I told Ms. Zimmer I would see her on Tuesday at 9am.

	Name	Title	Date
Prepared by:	Lynda Beard	Mgr. Ops. Svcs.	12-7-97
Concurred:	[Illegible]	Director OS	12-15-97
Reviewed:			

Retention Period: See O.P. 47

Fwd. Original to: Employment Office

1. Name Zimmer, (Last) Sharon (First) J. (Initial)

447-54-3608 (S.S. No.) F (Sex) W (Race)

2. Resigned ☐ Dismissed ☐ Work Completed ☐
Laid Off ☐ Retired ☒

3. Rate of Pay $591.50-Weekly 4. Wage Step ____

5. On leave when lost: Yes ☐ No ☒ 6. NCS Date 5-7-93

7. Date of Notice ____ 8. Last Day Worked ____

9. PCR Eff. Date 12-14-98

10. Title D.A. Operator

11. Department Special MKTS/Operator Services

12. Office Location 307 N. Kentucky, McKinney, TX 75069

13. Personnel Records Location 4100 Bryan, Rm 1175, Dallas, TX 75204

14. Hours of Work: Regular 40.0 Part-time _____
Temporary _____ Occasional _____
(Report number of scheduled hours)

15. Leave of Absence Requested ☐
Leave of Absence Offered ☐

16. Transfer Requested ☐ Transfer Offered ☐

17. Interested in future work:
PT ☐ Temp. ☐ Occ. ☐ Not Interested ☐

18. Forwarding Address 630 Bondera St., McKinney, TX 75070

19. Forwarding Telephone No. (972) 562-1602

20. Name of Immediate Supervisor: Lynda Beard
Tel. No. 972-569-30 [Illegible]

21. Employee appraisal at time of loss:

Job Performance SW-1095 Dated 12/31/97	Meets Expectations	Below Expectations
Measurement of Work	☐	☒
Attendance/Punctuality	☒	☐
Safety	☒	☐

Attendance Last 12 Months			
	Incidental		Disability
Times Tardy	Times	Days	Days
0	0	0	187
Explain Unusual Occurrences Was on disability for entire year			

22. Re-employ: Yes ☐ No ☒
If no, state reason Ms. Zimmer was on a DML for conduct when she went out on disability.

23. Reason for leaving (be specific) Ms. Zimmer was on Long Term Disability

- Correct: Lynda Beard Mgt.-Opt. Svcs. 972-569-3010
  Signature Title Tel. No.

  Concurred: Linda Smith Area Manager 972-569-3000
  Signature Title Tel. No.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHARON J. ZIMMER,	)	
	)	
Plaintiff	)	CASE NO. 4:01CV139
vs.	)	
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
	)	
Defendant	)	

ORAL VIDEOTAPED DEPOSITION
SHARON J. ZIMMER
July 21, 2003

ORAL VIDEOTAPED DEPOSITION OF SHARON J. ZIMMER, produced as a witness at the instance of the Defendant and duly sworn, was taken in the above-styled and numbered cause on the 21st day of July, 2003, from 9:37 a.m. to 12:35 p.m., before Sheretta L. Martin, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Baxter Gibbs & Robison, L.L.P.; 500 South Tennessee Street, McKinney, Texas 75069, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[28] Q You worked for Southwestern Bell in Oklahoma; is that correct?

A Yes.

Q What years did you work for Southwestern Bell in Oklahoma?

A 1973 to 1987.

Q What facility in Oklahoma did you work at?

A Which location?

Q Yes.

A Numerous number of locations. I worked downtown; I worked on the one on Memorial; I worked on the one on Garnet – two of them on Garnet.

Q What city are we talking about?

A Tulsa.

Q So you worked at least four different locations in Tulsa, Oklahoma?

A Yes.

Q What was your job title in Southwestern Bell Oklahoma?

A I had different job titles. I did long-distance operator; I did accounting; I did engineering clerk, cable clerk.

Q Any other job titles you can recall?

A Not that I can recall, no.

Q Were you a directory assistance operator in

* * *

[36] Q Protractor?

A What is it called?

Q Protractor?

A Protractor. That's it, yes.

Q Like the little thing that has a little pen thing and you stick and you can make circles?

A Right.

Q Which of these positions did you hold in 1987 when you left Southwestern Bell?

A The engineering clerk.

Q What happened in 1987 that caused you to leave Southwestern Bell in Tulsa, Oklahoma?

A My husband, at the time, got transferred with Rockwell International to Oklahoma – I'm sorry, not Oklahoma, to California.

THE REPORTER: I'm sorry, your husband got transferred where?

A To California.

Q (By Mr. Guy) You said the company was Rockwall International?

A Rockwell International.

Q Rockwell International. So you resigned your job to move with him?

A Yes.

Q Who was your supervisor at the time you

* * *

[40] with Southwestern Bell. You said that was approximately in 1993?

A 1993, yes.

Q Where did you begin working, at which facility?

A In McKinney.

Q There are a couple of facilities in McKinney, which facility in McKinney did you work at?

A The facility on Kentucky.

Q What type of facility was that?

A It was information operator.

Q What was the process that you went through to go about becoming reemployed with Southwestern Bell?

A I went down and filled out an application.

Q So it was like you were a brand new employee?

A Yes.

Q Were you specifically applying for a directory assistance operator position?

A At the time anything they had open.

Q And that was what was available?

A Correct.

Q So you were hired on in 1993 as a directory assistance operator?

[41] A Yes.

Q Was that the job title you held the entire time you were in McKinney?

A Yes.

Q Was that the job title you had from '93 until '98 when you ended your employment with the company?

A Yes.

Q How many different facilities did you work at during that time frame, '93 to '98?

A One.

Q Was that McKinney, Kentucky Street location?

A Yes.

Q Do you remember your wage, your hourly wage?

A I started out from rock bottom when I started. I had to wait for five years to bridge my service, and I don't remember the salary.

Q List for me the names of the supervisors that you recall having during your McKinney –

A McKinney office, I had Roy Baltazar.

Q Baltazar?

A Yes, that's it. Danny White. I had Linda Baird. I had another lady, but I do not – she was [42] my very first one – and I do not remember her name at all. I've been trying all weekend to remember her name, I just don't remember.

Q Any other managers you remember?

A Lou was our second line, Lou Williams. Lisa Espinosa was in that group also. She was one of the supervisors. I didn't normally report to her. Linda was my immediate supervisor.

Q Hardee Mills was there when you were there?

A I'm sorry?

Q Hardee Mills?

A Was he third line.

Q Yes, I believe so.

A Right. That name is very familiar, yes.

Q But you didn't ever report directly to him?

A No.

Q And you mentioned the name Linda Baird a couple of times. Was she your manager for most of the time you were there?

A Yes. From the time – right, she was. Starting sometime in '97, I believe, the latter part of '97.

Q What about Lou Williams, when was he your manager?

A I had a manager before that, a female. I [43] don't remember her name either before Lou. She was second line.

Q Linda Baird was your direct supervisor?

A Correct.

Q Lou Williams was a second level?

A Yes.

Q Meaning he was two steps above you?

A Yes.

Q So you never reported directly to Lou Williams?

A No.

Q What about Roy Baltazar, was he your direct supervisor?

A He was also my direct supervisor. I had – like, I said I had several.

Q Danny White, was he your direct supervisor or she?

A He wasn't my direct supervisor, but he was one of the supervisors. If, you know, my supervisor was gone, then I would report to him.

Q So he was another first line manager that was in the group?

A Yes, correct.

Q Describe for the jury what your job duties were as a directory assistance operator?

[44] A Worked on the computer taking incoming calls for directory assistance, keypunching it into the computer, letting it come up on the screen and give the customer the number verbally, if they request it, or sent it on to the computer where it gave it to them.

Q What were the typical requests made of you as a directory assistance operator by the customer?

A To look up numbers, residential business.

Q So when somebody picks up the phone and dials 1411 you were the person that might pick up the phone?

A Correct.

Q You said you worked on a computer. Do you have a terminal that you accessed?

A Yes.

Q What kind of information was at your disposal?

A All kinds of information. It was residential business, special business. It was another one, but I don't remember what it was.

Q You receive the telephone calls through some kind of telephone system?

A Terminal, yes.

Q Describe for the jury the apparatus you use

* * *

[49] physical labor involved in the position?

A As far as – what do you mean?

Q Lifting?

A No.

Q Bending?

A Just sitting down.

Q So it was a sedentary position?

A Yes.

Q I want to talk about the time frame. I know there are different parts. You just referenced a point in time when you became disabled in your words. Walk me though kind of a time line when you worked at Southwestern Bell when you began experiencing problems?

A Okay. I had a automobile accident February 1st, 1996.

Q And how did that affect your job at Southwestern Bell?

A I had a cognitive brain disorder; I had physical limitations.

Q Okay. How did that affect your ability to do your job at Southwestern Bell?

A I had to have a certain cubicle where it was specifically just for me that was put – that was given to me by my immediate supervisor at the time.

[50] Q So after February 1st, 1996, your ability to do your job was affected by the car accident?

A Yes, it was.

Q From February 1st, 1996 through December 1998, were you ever able to return to a normal function in doing your job?

A Yes.

Q At what point in time were you –

A I returned in September of 1996.

Q Let me piece together my time line here. 1993 you start working as directory assistance operator –

A Yes.

Q – and you work until February of 1996 without any issue as far as your ability to perform your job?

A Correct.

Q February 1st, 1996, you have an auto accident?

A Yes.

Q And suffer some physical and mental injuries?

A Correct.

Q From February 1st, 1996 through September 1996, you were absent from the job due to [51] the injures you sustained?

A Yes.

Q You returned to Southwestern Bell in September of 1996?

A Yes.

Q When you returned in September of 1996, how long did you work at the company before your employment ended?

A I worked until December of 1997.

Q So from September of 1996 to December 1997, you returned to work and worked your job, normal hours, doing the same thing you did before?

A Correct.

Q What happened in December of 1997 that changed?

A Thanksgiving I had came into the office to go to work, to report to work – I believe it was Thanksgiving day. When I came in, I sat down at my cubicle, my seat, and I thought oh, well, somebody's moved my seat. I'm readjusting everything, my computer, my seat, the keyboard. At that time I saw a headset that was laying in the cubicle. Thinking, oh, wow, somebody's setting here. So I go ahead and readjust everything, get it all fixed to where I could start taking calls. In the meantime the person [52] that was sitting there came back into the office and he said, oh, I thought you were off today – his name is Makon – and I said, no, I'm working today, but you should at least show a little bit of common courtesy because there is a note on this position for no one else to sit here because I have to have certain settings because of my disability.

And he came back with well, you've got the best seat in the house for the football game. Usually on the holidays, the supervisors would let us watch the football games while we took calls. It's like Christmas and Thanksgiving. And then he went ahead and left. A service assistant came over, Carol, and said what is the problem here, and she could tell that there was some friction, and we had a few words. And she said, well – I said I need to call the union about this, this consistently happens. She said well, do you want me to get the number for you? I said, no, I'll do it on my own time. That was the end of it.

Q So what about that incident caused –

A I was called into my supervisor's office with the union, we talked about it. And then another week later I was called back in, I was given a DML.

Q What is that?

[53] A Decision making leave to see if I wanted to keep my job or not.

Q Was that some form of discipline?

A Yes.

Q So you were disciplined approximately a week after this incident occurred?

A Correct.

Q What was the primary – describe for the jury the specifics of this discipline. What did it involve?

A I would go home, take a day off with pay, and decide if I wanted to keep my job or not.

Q Did you return to work after you took that day off?

A No, I did not. I called my doctor, my psychiatrist, I went to see her and she took me out on disability leave again.

Q And you did not –

A Because I was so upset and stressed out about the situation.

Q Did you return to work at Southwestern Bell after you took that leave of absence?

A No.

Q And you gave a December 1998 date as the ending point of your employment with Southwestern [54] Bell. What happened in December of 1998?

A I was on another year of disability after that. Southwestern Bell left me on disability for the whole year.

My doctor at the time, Dr. Barbei Farkas, tried to get me back to work from March of 1998 to November of 1998.

Q You said from March 1998 to November 1998 your doctor tried to get you back to work?

A Yes.

Q What was involved in her trying to get you back to work? I'm sorry, was it May or March of 1998? May 1998 through November or March?

A March. March of 1998 through November of 1998.

Q So Dr. Vargas was trying to get you back to work during that time period?

A Dr. Farkas.

Q Farkas. What was Dr. Farkas doing?

A She was speaking with whoever handled that department to get me back in off of disability back to a working position. She spoke with someone downtown, and I do not remember the lady's name.

Q But you didn't return to work at Southwestern Bell?

A No, I did not.

[55] Q And you said from March '98 to November 1998 Dr. Farkas was trying to get you back to work?

A Yes.

Q What happened from November 1998 to December 1998, that last month of your employment with Southwestern Bell?

A I was still on disability. The person she was working with – finally I came to realize, well, this looks like Southwestern Bell is going to let me go, and that's what they did.

Q So December of 1998 you were terminated?

A January of 1999 I got the later [sic] through the mail where I was terminated, yes.

Q Earlier you testified your employment ended in December 1998. So is it your testimony now that it ended in January of 1999?

A I worked in December 1998, but then I was on disability for that approximately another year until January of 1999 when I received a letter through the mail that I was terminated.

Q You said through December 1998?

A Yes.

Q And you said there was another – let me back up. You said that from March '98 to November [56] '98 your doctor was trying to return you to work?

A Yes.

Q And you said another month later, December '98, it was apparent to you, you weren't going to be returned to work.

A It was apparent to me, yes, we weren't getting any feedback from Southwestern Bell.

Q And you said you were on disability for another year after that?

A No. I was on disability from December of 1997 through until January of 1999, when I was terminated.

Q So you were on short-term disability?

A Yes.

Q You never went to long-term disability?

A I don't remember. What is the difference?

Q Well, I can't answer your questions; I'm not under oath. But as far as you know, your testimony, you don't have personal knowledge of ever going to long-term disability?

A No. I don't remember.

Q January 1999, what did the letter you received state?

A Stated my termination date, my beginning service date, they were giving me pension disability, [57] they gave the amount, when I would start receiving it.

Q What was your state of termination date?

A January of 1999.

Q Do you remember what date?

A I don't remember the day exactly, no.

Q You said you got pension disability?

A Yes.

Q Did the letter that you received in January 1999 state that you were being terminated?

A Yes.

Q But you also received pension disability?

A Yes. All it had was my service date, when I began, my termination date, and my pension disability salary. Had a few other things on there, but I don't remember. Insurance I think was on there. I don't – there were a few other things.

Q Did the letter state a reason for termination?

A No.

Q Did it actually read in those terms termination date?

A No, it just had it in order, service date, when I started, termination date, you know, a few other things up in that area, and then – then I was [58] receiving pension disability and the salary.

Q Well, my question is though: Did the letter actually say termination date –

A Yes.

Q – or did it have some other term on it?

A It did have termination date on the letter, yes.

Q It did not state a reason for termination?

A No.

Q Did you speak to anyone at Southwestern Bell to find out the reason for termination?

A My – here again – I don't remember to be honest with you. I went through all of this with my doctor at the time Dr. Farkas. She dealt with the lady downtown that

handled that department to get employees back to work from disability.

Q Did you ever speak to anyone though independent of your doctor that explained to you why you were being terminated?

A No.

Q As you sit here today, do you have any reason why you were terminated?

A No.

Q So you don't know why you were terminated?

A No, I do not.

[59] Q You said you received a pension disability?

A Yes.

Q Do you still receive that?

A Yes.

Q What is the amount per month that you receive from disability?

A After taxes it's $430 and some cents, and I don't know the actual cents.

Q That's per month?

A Yes.

Q Do you know the gross amount?

A No.

Q Do you also continue to receive medical benefits?

A Yes.

Q Full lifetime medical benefits?

A Yes.

Q Does that also cover your prescription medications?

A Yes.

Q Do you receive the $430 per month for life?

A Yes.

Q I want to back up with you and go back and talk a little more in detail about a couple of these incidences.

[60] A Sure.

Q You said that you had a car accident February 1st, 1996?

A Yes.

Q What happened to lead up to the car accident?

A I was going LBJ Freeway getting ready to take the exit for Sherman to go north and there was ice on the road, and I slipped on the ice went over the embankment. Also, a policeman was following me, yes.

Q Explain that to me a policeman following you.

A I think at the time I was dating a man and we had broken up. And I called him on the phone and told him that I was going to kill myself. But I do remember calling my daughter and leaving a message on the recorder at home, Heather I'm okay; I'm on my way home. In the

meantime, he called the police as I was leaving the club, and the police showed up.

Q You were leaving which club?

A Stampede was the name of it.

Q Was he at Stampede's when you were leaving?

A Yes.

Q Had you and he had a fight prior to your [61] leaving –

A Oh, no, no, The policeman?

Q No your –

A Ex-boyfriend, no.

Q Yes. Was the policeman at Stampedes?

A Yes, he was.

Q How do you know he was at Stampedes?

A He came up to me and I just ran to my truck and got in my truck and left.

Q When he came to you what did he say?

A I don't remember.

Q What caused you to run to your truck once the policeman approached you?

A I was getting ready to leave anyway, and I was headed home.

Q Something he said caused you to take off running to your truck?

A Yes.

Q You don't remember what that was?

A I don't remember, no.

Q Once you got in your truck and you drove off, he got in his car and –

A Followed me, yes.

Q What sort of rate or speed were you traveling at?

[62] A I don't remember.

Q Were you driving pretty fast?

A I think the report itself said 70.

Q Stampede is located in?

A LBJ and Preston.

Q When the police officer was following you did he have his emergency lights on?

A Yes, he did.

Q Did you see him behind you with his lights on?

A Yes, I did.

Q Did you have any intention of pulling over?

A I don't know to be honest. I do know that I freaked out because I saw the lights behind me and thinking of the DWI that I got, you know, and I had been drinking. And thinking, oh, I'm going to get pulled over again. That's all I remember.

Q Why didn't you stop and talk to the police officer before you left the club?

A He did speak to me about something, but I don't remember what it was. And then I just took off and ran to my car – to my truck at the time.

Q When you were running to your truck, was he chasing you or saying anything?

A I don't remember.

[63] Q But you do recall when you got to your truck and you started driving off –

A Yes.

Q – he was behind you with his light on?

A Yes. Well, he didn't turn his light on until we got to the frontage road.

Q When you got on the frontage road, what was your intention to make it all the way to your house?

A Yes. From what I remember.

(Off the record discussion)

Q (By Mr. Guy) So what happened? You got to the frontage road and what happened at that point?

A I put on my left-hand turn signal, got on LBJ Freeway going east to exit the Sherman exit.

Q This is from the frontage road?

A The frontage road. Then I exited onto LBJ from the frontage road.

Q You got on at which – what spot?

A Right after Preston. Preston has an entrance onto LBJ Freeway right directly after the stoplight probably about a half mile down the road.

Q So you got on the freeway, and you were going towards the exit to Interstate 75?

A I was going to – yes, to the Sherman exit. As LBJ and Central intercedes there, it has a sign [64] that says Sherman.

Q To take 75 north?

A Yes, that is 75 north.

Q So you made it to that exit ramp?

A Yes.

Q And that's where the accident occurred?

A The accident, occurred on the exit from LBJ to Central.

Q And you said there was ice on the road this day?

A Yes.

Q Was it a lot of ice or just a little bit of ice, some patches?

A I don't remember. All I remember it was an ice storm.

Q And you said that you were told you were going about 70 miles per hour?

A From what I recall, yes.

Q Do you recall anything about the accident itself?

A No.

Q What have you been told happened?

A As far as the report, the accident report, or as far as what my doctor has told me?

Q As far as anyone that was there that saw it

* * *

[68] A Yes.

Q And you said you were in a coma for 27 days after the accident?

A Yes.

Q How long were you hospitalized total?

A I was hospitalized from February the 1st to the 27th, I was at Parkland. When I came out of the coma they moved me to Plano Rehab Hospital, and I was there until May of '96.

Q What kind of injuries did you sustain?

A I had an open head injury; I broke my right wrist, left wrist, eight ribs; I broke my pelvis, collarbone, shoulder blade; I had multiple bone injuries.

Q The bone injures, I assume, heeled as bone breaks do, bone fractures do?

A Yes.

Q What was the lingering effect of the accident?

A What do you mean?

Q Was there any part of your injuries that didn't heel and continue to become a problem?

A I heeled [sic] okay, but I – you know, everything is a problem now.

Q What part of the injuries –

[69] A The pelvis –

Q – continue to exist after the –

A Right, the pelvis. My leg was messed up so they had to do surgery on my leg. They thought at one time of amputating my left leg. You know, I just had a lot of physical injuries.

Q Which physical injuries did not heel [sic]?

A Okay. They all heeled [sic], but I have problems now with them because in my pelvis I've got two, 10-inch screws. And I'm always going to have problems with it. And walking – they didn't think I would ever talk again, I would even walk again, I would ever even, you know, become what I've become today.

Q You say you still have problems and you cite the pelvis, what kind of problems are you talking about?

A Pain. I've got two herniated disks now. I've got two, 10-inch screws in my pelvis, which still give me a little bit of a problem. Just sitting, standing, you know, I have pain.

Q Does the problem that you described with your pelvis or any of your other physical problems, does it prevent you from doing day-to-day activities now?

[70] A Now?

Q Yes.

A Yes. Now, it does. I live in a two-story house. It's very difficult for me to climb up and down the staircase. I, basically, do my dishes, my laundry, that's about it. I mean, I can't lift over 25 pounds. My balance and coordination is off, so I don't do a lot of things that I used to do.

Q Other than those things you described, is there any other way that your physical injuries limit your ability to do things?

A For instance, what do you mean?

Q Well, in any way.

A Well, yes. I used to take care of my yard; I can't do my yard work now. I can't carry big boxes. A lot of different things. I can't do a lot of stuff at home myself.

Q Let's talk about your head injury.

A Okay.

Q Did your injury – you described it as an open head injury?

A It's a cognitive brain disorder.

Q What is that?

A And I had a open head injury, yes.

Q What is a cognitive brain disorder?

[71] A You would have to ask me that. I don't know the definition of it.

Q How has it affected you?

A I have long-term and short-term memory loss. I've – you know, I work on that on a daily basis, and I still do. I'm sorry, what was the question again?

Q How does the cognitive brain disorder affect you?

A My thinking. As far as learning something new, I am not supposed to be able to. As far as doing things that I've done in the past, I can still do, but to learn something new, I'm not capable of doing that.

Q Okay. Any other ways that the cognitive brain injury that you suffered or the cognitive brain disorder affects you?

A Not that I can think of, no.

Q With respect to both physical and, I guess the head injury is physical too, with respect to the physical and mental injuries you sustained in the car accident, are you able to walk?

A Yes.

Q Talk?

A Yes.

[72] Q You see okay?

A Yes.

Q Can you cook meals for yourself?

A I do, but it takes longer for me to cook now than it used to. Takes me longer to do everything.

Q Are you able to clean house?

A Not very good.

Q But you can do some things?

A A little bit, yes. Very little.

Q You said that you have some memory problems, but you can remember some things obviously?

A Yes, some things I do remember; then there are some things I do not remember.

Q You said that the injury has affected your ability to learn?

A To learn something new. As far as my ability to do what I have done in the past, I'm capable of doing. I did do it when I went back to work with Southwestern Bell.

Q So you're still able to type on the keyboard?

A Correct.

Q You can still do that today, type on the computer keyboard?

[73] A Yes.

Q Answer questions for customers?

A Yes.

Q You're still able to process – go through the mental process of listening to what they need and coming up with answers to their questions?

A Yes.

Q Are you able to dress yourself?

A Yes.

Q Do you still drive yourself?

A Yes.

Q Is there anything major that you used to do that you can't do now?

A I used to work out, I did aerobics. I used to go out dancing; I just don't do anything anymore.

Q Socially you're talking about?

A Socially, yes.

Q As far as just day-to-day necessary things or the things that you can't do now that you used to be able to do before this accident?

A I'm sorry?

Q As far as just – I'll call them necessary – things that you did for yourself, are there things that you used to be able to do for yourself that are necessary things?

[74] A That I do now?

Q That you can't do now?

A Yes, that I can't do.

Q Are there things that you used to be able to do for yourself –

A Right.

Q – that you can not do for yourself now?

A Correct.

Q And your answer is?

A Okay. I'm not understanding the question.

Q I'm just trying to – we talked about a lot of things that I can think of: Walking, talking, dressing yourself, cleaning house, cooking. Are there any other things like that?

A That I used to do that I cannot do now?

Q That you used to, yes?

A No, I think we gone over it all, the exercising, the dancing, you know, taking two-step lessons. I think that's it.

Q Now, from February 1st, 1996 through September 1st, 1996 when you returned to Southwestern Bell, you were in the process –

A Yes.

Q – I assume of rehabilitating yourself?

A Correct.

[75] Q During that time period, you had limitations on what you could do?

A Correct.

Q Once you returned to Southwestern Bell though, is it your testimony that you were able to do your job just as good when you returned as you used to before you left?

A Yes.

Q So you had no problems keeping up with the volume of calls?

A Correct.

Q You had no problems processing the customer orders?

A Correct.

Q Was there anything about the job that you can think of as you sit here today that just was impossible or difficult to do when you returned in September 1996?

A No. Believe it or not, once I sit down at the position, it just all fell into place.

Q So, I guess, it goes to mind what you were saying that you can remember the old things that you used to do?

A Right.

Q From September '96 through December 1997, [76] you did your job, I guess, in your estimation, just as good as you'd always done it?

A Yes.

Q December of '97, I think you testified that you ended up going on leaving going on disability leave of absence?

A A DML for a day and then my doctor took me out for the rest.

Q Okay. What was – what was the issue or problem that you were having December of '97 that precipitated the disability leave of absence?

A The confrontation with the other operator sitting at my position.

Q How did that cause you to somehow become disabled and have to take a leave of absence?

A It stressed me out, nervousness. I was crying. I couldn't understand why Southwestern Bell was doing this to me.

Q Doing what to you?

A Giving me the DML, which I should not have had it, I didn't believe because that was my position. It was – a piece of paper was put on there that that position was for me. Its common courtesy for any other employee in the office to abide by what that piece of paper said.

[77] Q So after you were disciplined in that particular incident and given the decision making leave of absence, you felt that the stress that came from the whole incident that you needed to take some time off?

A My doctor took me off, yes.

Q You said that its general stress and anxiousness and nervousness that you were feeling?

A Yes.

Q Were there any physical problems that you began to experience December of '97 or was it mostly emotional?

A Mostly emotional. But I still have physical problems also. I will always have the physical problems that I have now for the rest of my life.

Q Things you described. The pain?

A Correct.

Q And some of the aches and things that you have?

A Correct. The balance and coordination.

Q In December 1997 when you took the leave of absence, were you experiencing any kind of recurring physical problems at all or was this all about the anxiety and stress that the – and the different [78] problems?

A The anxiety and stress of the whole situation –

Q December ninety – I'm sorry?

A I'm sorry – with the confrontation with the other operator.

Q December 1997, if this DML had not happened, would you have needed to take a leave of absence?

A I don't – no. I was just doing just fine. I was doing my job taking the average amount of calls that I should be taking.

Q So you didn't feel that December 1997 that you somehow became unable to do your job?

A I'm sorry?

Q I didn't – that wasn't a very good question. I confused myself.

A That's okay.

Q Thanksgiving 1997 on into December 1997 –

A Right.

Q – do you feel you were still able to physically do your job?

A Yes.

Q And mentally you felt like you still process and do your job?

[79] A Mentally, I could not.

Q Because of the discipline?

A Because of the DML and the way Southwestern Bell – they were disciplining me when I was in the right and the other operator was in the wrong.

Q If that incident had not happened, though, your best guess is that you would have still been able to do your job both physically and mentally?

A Yes.

Q And that even maybe as you sit here today you could have continued to do it up until today?

A Yes.

Q With respect to the Thanksgiving incident, you said you came in – and this guy's name was –

A Makan.

Q Makan. Nissani?

A And I don't remember – yes.

Q Mr. Nissani is N-I-S-S-A-N-I?

A I'm not sure how exactly it's spelled.

Q But you know his first name was Makan?

A Yes. M-A-K-A-N.

Q You came in – he wasn't actually sitting at your desk when you got there?

A No, he – there was a relief card up, he had gone on break. I saw the relief card open and [80] I first thought,

oh, I left the relief card from my previous shift. I took it down, sat down, my seat was lower, my computer screen was different, my keyboard, everything was adjusted.

Q Now, you say – you keep saying my keyboard, my seat –

A Uh-huh.

Q – and this is a place that you had been sitting at everyday?

A Correct.

Q Your managers had given you a place that you always sat at?

A Yes. They told me to choose a position and they would put a note on the screen that no one else sits there. I choose the position that was right at the front of the office, right in front of the SA desk because I knew no one had ever set there.

Q So this day you came in Thanksgiving 1997, you saw the headset sitting on the desk?

A Well, at first I saw the relief card up.

Q Then you noticed at some point there was a headset there?

A Right. I started re-adjusting my chair, my position, my keyboard, my screen, and then I noticed the headset, yes.

[81] Q. And that was not your headset?

A No, it was not. That's when it occurred to me oh, someone is sitting here.

Q When Mr. Makan – the guy returned – you and he had words?

A Yes.

Q Is it fair to say that you guys got into a pretty heated exchange before long?

A Not really. I just looked at him and he said, oh, I didn't think – well, he – yeah, he said, oh, I didn't think you were here today. And I remember, saying well it doesn't matter if I'm here or not this position is for me because of my disability. You should have a little bit of common courtesy. And then he came back with something, and then the SA intervened.

Q At any point during that conversation did you throw his headset on the ground?

A No, I did not.

Q Have you been told by anyone during part of the investigation that followed that you threw his headset?

A Someone said I did, but I remember distinctly I put it right back up on the position.

Q You say you put it back up on there, that [82] would suggest that it somehow left the position. What happened with the headset?

A Well, no, it was there and I thought, oh, and I just dropped it. It was just on the position.

Q So you picked it up?

A I don't remember.

Q Well, you said you remember putting it right back right where it was?

A Well, I know it was – I remember seeing the headset. Yes, I was told I threw it on the floor, but I don't remember that, and I don't really think I did. I was also told that we were loud, interrupting other operators. The union investigated that, half of the office says I was, half of the office says we weren't.

Q Did your voices raise?

A I don't recall, to be honest with you. If my voice raised, I don't recall it raising. I thought I was well in control of myself.

Q Now, you do remember that day that you were a little peeved because he was in your seat, a little upset?

A I wasn't really peeved, I was disappointed that he would have the discourtesy of setting in a position when it was, you know, fixed for someone [83] else. There were other people in that office disabled also. If I came in and someone had a position and the football game was on and they were disabled and it was fixed specifically for them, I would not engaged in taking that position. I would have some common courtesy, whether the football game was right there or not.

Q Okay. With respect to the headset, though, you just don't remember as you sit here today?

A I don't remember, and someone said I threw it on the floor, but I don't remember. I don't recall, and I don't think I did.

Q You don't think or remember – well, you don't remember –

A I don't remember.

Q – whether your voices were raised or not?

A Correct.

Q The service assistant who intervened you said her name was Carol?

A Carol, yes.

Q Carol Wyatt?

A Yes.

Q What did Carol say to you when she intervened?

A She intervened, came up and said something, [84] what's going on? I don't remember, actually. And I said, you know, I said, I'm really tired of this, I need to talk to the Union about this. Well, I can get you the number. I said, don't bother Carol, I it on my own time.

Q Did you work that shift that day?

A Yes, I did.

Q When was the first time someone came to you to talk about discipline for that incident?

A It was about – probably about five days later.

Q Who came to you to talk about discipline?

A Linda Baird.

Q What did Linda say to you when she approached you?

A That she needed to see me in the conference room.

Q What did you guys – well, did you, in fact, go to the conference room with Linda?

A Yes, I did.

Q What did you guys discuss when you went to the conference room?

A What had happened.

Q You told her what you just told me I assumed?

[85] A. Correct.

Q What did she tell you in response?

A She said they would check out and they would talk to Makan and get back with me.

Q Did they get back with you?

A Yes, about five days to a week later, yes.

Q So it was five days between Thanksgiving and the time she called you into the conference room?

A Yes.

Q And then there was another five to seven days between the time that you left the conference room to the time that she talked to you again?

A Right.

Q So about a week and a half?

A Right. I think the date that I officially got the DML was December 7 or the 8th.

Q I assume then from your statement there after you left the conference room, the next time you talked to her she was approaching you to administer some discipline?

A Correct.

Q So Linda Baird again approached you five, seven days later after the conference room visit?

A Linda and Lisa Espinosa and plus the two union stewards.

Q Tell me what happened when they approached you again?

A Well, Linda said she needed to see me in the conference room. So I went there and there's Lisa and two union stewards and that's when she sat down and said that she was giving me a DML.

Q Who all was present at that meeting?

A Brenda Darling and Debbie – I don't remember Debbie's last name.

Q They were the union stewards?

A Yes.

Q Brenda Darling?

A D-A-R-L-I-N-G.

Q Brenda Darling and the other union steward were there on your behalf?

A Correct.

Q As union stewards they were there to protect you, I guess, protect your rights as a union member?

A Correct.

Q And you were a member of the union at that time?

A Yes.

Q What happened or transpired during that meeting?

[87] A. Linda just confronted me, told me, you know, that she had talked to Makan, you know, talked to me and decided that she was giving me a DML. And I said what is a DML? Because I've never had one, I didn't know what one was. She said it was a decision making leave. Were giving you a day with pay to decide whether you want to keep your job or not.

Q At that time did she also tell you that she had spoken with other people who said that you threw the headset?

A I don't remember.

Q At that time did she tell you that other people said that the argument between you guys escalated to the point where it got loud?

A Not at that time.

Q Did she tell you about that later or was it do you –

A I don't remember when she told me that, but I know I was told, yes.

Q By Linda Baird?

A Yes.

Q Did she discuss with you the reasons why the volume of your discussion was a problem in her eyes?

A No, I don't remember.

[88] Q. Were you aware, as a directory assistant operator, that customer affecting behavior was considered a serious violation policy?

A Yes.

Q Explain to me what you're [sic] understanding of that policy was?

A Being loud in the operating office is distracting for other operators. You know, you can check my record. I was not loud or obnoxious. I had I a few little checks against me like putting on make-up at my console, drinking a beverage without it being in a cup. Just little petty stuff. But as far as something big with what was happening then, never had that confrontation be fun.

Q Just generally speaking though about the policy, you understood the policy of not being loud in the area?

A Correct, yes, I do.

Q And you understood that was because they didn't want to disrupt other operators?

A Correct.

Q And also because it still might appear to be unprofessional?

A Correct.

Q So you had no problem with that rule?

[89] A No, I do not.

Q At some point during this process she discussed that was a concern of hers with this whole Thanksgiving incident?

A From what I remember, yes.

Q So she administered the DML to you?

A Correct.

Q And you took the one day off?

A Yes.

Q Do you remember whether your doctor removed you from work the next day or –

A The following day, yes, I – she made an appointment, and I went in to see her.

Q You said she, who is this doctor we're referring to?

A I'm sorry?

Q Who are we talking about?

A Dr. Farkas.

Q Dr. Farkas is a psychiatrist?

A Psychiatrist, yes. It's F-A-R-K-A-S.

Q What did you go see Dr. Farkas for?

A Because I was getting the DML. I couldn't understand why I was getting the DML.

Q But why would you go see a psychiatrist for that, Dr. Farkas?

[90] A. Because she is my psychiatrist. I go once a week irregardless, and I'm thinking that the following day was my day to go.

Q So you discussed it with her and told her you were really stressed about that?

A Yes, very upset about it.

Q Whose suggestion was it to – for you to take a leave of absence?

A She did.

Q Did she tell you why she thought that was a good idea?

A No. She just said she was taking me out. She has all of this in her notes.

Q So from December until at least March the next year – from December '97 to March '98, it was her opinion that you should be on leave of absence?

A Right.

Q Did something happen in March 1998 to cause her to believe that you should return to work?

A I was better. I was coping with the DML; I was coping with the stress, the anxiety. I was okay to go back to work.

Q So between – during those four months, from December 1997 to March 1998, you felt that mentally you had gotten over the anxiety of the [91] stress of the discipline and the incident that occurred on Thanksgiving?

A Yes. Or she – I mean, if I had not gotten through it she would not have sent me back.

Q So March 1998, whose idea or suggestion was it for you to return to work?

A Dr. Farkas.

Q She told you she thought you were ready?

A I asked her when I could go back to work. I had probably been asking her for about a month and when she felt like it was time for me to go back, then she would let me go back.

Q Did you have any – did you and Dr. Farkas discuss the basis for determining when you should go back to work?

A Yes.

Q What was the – what was the thing that you were looking at on considering when deciding when you thought you should be able to return to work?

A When she felt like I was ready to return to work. I was very upset; I was suicidal because of everything that happened and that's why she kept me out for so long.

Q You were suicidal in December 1997?

A After the DML I progressed and got worse

* * *

[96] being returned to work?

A No.

Q As you sit here today, do you have any idea why you weren't able to return to work?

A No.

Q You have testified that you were given a specific cube to work in at Southwestern Bell. I assume that occurred September '96 when you returned to work, you requested and were given a specific place to work in; is that correct?

A Yes.

Q And you worked at that one specific cubicle, I guess, through Thanksgiving of 1997?

A Through December of 1997.

Q So you went to the same cubicle every day?

A Correct.

Q And you said you were given that one cubicle because you were disabled?

A At the hospital, at Plano Rehab Hospital, the girl that takes care of that department for disabled people for to getting them back to work came to evaluate me at that office. I met her up at the office before I went back to work so she could evaluate me and notify my supervisors of what I was going to need.

[97] Q Do you remember what she told them that you would need?

A A one-station cubicle. My chair has to be set at a certain level, my keyboard, my screen.

Q Okay. So she came out and looked at the facilities and said give her this – give her a specific cubicle?

A Correct.

Q As far as the height adjustments and keyboard and seats and all that kind of thing, you got familiar with what you needed and were able to adjust that to your specified height?

A Right.

Q Did you have some kind of ergonomically designed keyboard or something that you used or was it a regular keyboard?

A No. It was a normal keyword like everyone else used.

Q After that person came out – you said from which facility?

A I'm sorry?

Q You said that was an employee of some kind of rehabilitation facility?

A Oh, right. Plano Rehab Hospital; that's where I did my rehab.

[98] Q So a representative of Plano Rehab Hospital came out to Southwestern Bell's facilities?

A Correct.

Q And evaluated your workstation?

A Correct.

Q Recommended that you get one cubicle and that you be allowed to adjust the seat and the height of the keyboard and monitor?

A Correct.

Q Is there anything else that she said that you needed?

A I know that she did state that it might take me longer to process the calls, but I didn't have a problem with any of them. You know, whatever else was – she talked to the supervisors about, I don't remember. I know, it was just to evaluate my workstation.

Q That was all that you needed to do your job, in other words?

A Correct, yes.

Q So you were given that?

A Yes.

Q And your managers agreed that was something they could do for you?

A Yes.

[99] Q You said that was because of your disability?

A Yes.

Q What was your disability?

A The cognitive brain injuries plus my physical disabilities. I have – since the left side – with my leg being mangled up and the brain injury paralyzes the left side. It was a right-sided head injury that paralyzes the left side.

So, I was paralyzed on the left side, but I did regain quite a bit of tone and range.

Q Well, you said you were paralyzed, but you were able to do your job?

A With one hand; I typed with one hand. You know, I – the doctors encouraged me use the left side, use the left side. Now, I use it a lot more but I was very, very sensitive about using the left side. It hurt, but that's why I went to rehab to regain the tone and the range. So, I was capable of getting back to a normal life.

Q When you returned to work in September 1996 to Southwestern Bell, is it your testimony that you were still paralyzed?

A Partially on the left side, yes.

Q But were you able to use your left side?

[100] A I could use it, yes. But here again, I afraid to use it because it was the injured side, you know, that's mentally. I just, you know, would not try – I would try to use it, but these fingers would not get to typing as fast as the right hand, so I did everything right-handed.

Q When you returned, though, you said you kept up with the same speed of answering phone calls?

A Correct.

Q And you had no problem meeting customer demands?

A Correct.

Q That you did everything just as good as you did before you left?

A Yes.

Q So your testimony is that you did that all with your right?

A Yes.

Q So you were able to type all the customer inquiries with one hand and still do the same speed as you could with two hands?

A Correct.

Q You didn't use your left hand at all?

A I tried to, but it just wouldn't get to moving. See I still have problems with it. I – you [101] know, I could move it more, but my fingers would not move on the keyboard.

Q Other than that, having problem with the left hand, was there any other problem that you had doing your job?

A No.

Q So what was the actual disability? I know you told me it was cognitive brain disorder.

A I got cognitive brain injury which paralyzes the left side. I've regained a lot of tone and range on the left side plus all of my physical impairment.

Q What was the result? What was the practical effect of the disability? I know you talked about limited use of your left hand, what else was – what else was it in the way of effect that occurred because of the cognitive brain injury?

A Okay. Rephrase your question. I'm not understanding your question.

Q Well, you gave me the title you said you have cognitive brain injury?

A Correct.

Q I'm trying to –

A Which paralyzes the left side.

Q Okay. And we talked about your hand?

* * *

[107] Q Explain to me what you mean when you say they failed to provide you a reasonable accommodation.

A They provided me the reasonable accommodation up until December of 1997, but when I was capable of returning back to work, I was told by Linda Baird that when I came back to work, if I came back to work, I would be sitting at a position just like everyone else; I would not have my specific position.

Q What was the reasonable accommodation?

A The reasonable – unreasonable or reasonable?

Q The reasonable accommodation?

A The reasonable accommodation was what I had had previously.

Q Which was?

A Which was the position in the cubicle, my seat always set at a certain position, my keyboard, my screen.

Q So your –

A I'm sorry. I had nerve and muscle damage. That's why, you know, I – it was very difficult for me to take the little knob and, you know, go around and around to get the position up or down.

* * *

[109] constructively discharged, you don't know what that term means?

A No, I don't. I guess I don't. What does it mean?

Q Well, you can discuss that with your attorney, I guess, if you want to know the answer to that.

A Oh, okay. Are you talking about the EEOC, what they have?

Q No. I'm talking about things that are in your petition. The lawsuit that you filed against Southwestern Bell.

A Okay. Right. Well, constructively discharged would mean that I was terminated.

Q That's your understanding of the term?

A Correct.

Q You believe Southwestern Bell wrongfully terminated you or wrongfully discharged you?

A Yes, sir, I did.

Q What's the basis for that allegation?

A For not accommodating me with my disability accommodation.

Q That's different than terminating you, though. How did Southwestern Bell wrongfully terminate you?

[110] A Okay. Rephrase your question?

Q Well, you told me about the failure to keep you in the same cubicle?

A Correct.

Q You said that you believed that that was discriminatory.

A That was beneficial for me, for my disability, and my cognitive brain injury.

Q The second part of the claim is that you were constructively discharged or wrongfully terminated.

A Correct.

Q I'm asking you, if you know the answer, what the basis of your allegation is that Southwestern wrongfully terminated you?

A Wrongfully terminated me because, you know, from March of '98 to November of '98 my doctor and I tried to get myself back to work over the phone with the lady in the downtown office that handles that department. She was unaware that I was even back to work for 14 months when Dr. Farkas was speaking with her. Here again, communication with Southwestern Bell and their department is a failure.

Q At some point in time Southwestern Bell offered you the opportunity to return to work at a [111] different location?

A Yes, they did.

Q Tell me about that.

A They offered me a position in downtown Dallas.

Q What kind of position?

A Information operator; same position I had.

Q That was unsatisfactory to you?

A Not to me, to my doctor's request.

Q To Dr. Farkas?

A Right. Dr. Farkas and Dr. Jones. Dr. Jones was my main doctor at the Plano Rehabilitation Hospital.

Q You said that was unsatisfactory to the doctors; is that correct?

A Yes.

Q It wasn't unsatisfactory to you?

A It wasn't satisfactory to me. Well – not really, it was a job. I was willing to go down there, but with my disability, I could not make the drive; I could not face the traffic, stress of the traffic. As far as getting downtown, my balance and coordination is off, that would mean walking on curbs, stepping up, stepping down. A lot of different things.

[112] Q Okay. So you were offered a position to go to downtown Dallas?

A Yes.

Q But you rejected that opportunity?

A Yes, I did.

Q And you said that was because of your disability, made it difficult for you to travel?

A Correct.

Q What about your disability made it difficult for you to travel?

A The stress of the traffic, the cognitive brain injury?

Q Well, I understand the stress of the traffic, that was going to be difficult for you to deal with.

A Uh-huh.

Q Dealing with the traffic between McKinney and Dallas?

A Correct?

Q How does the cognitive brain injury, how did that relate to your decision that you couldn't travel to downtown Dallas?

A Okay. I'm not understanding the question.

Q How did the cognitive brain injury prevent you from traveling to downtown Dallas?

* * *

[117] Dallas. You said maybe because of the long-term, short-term memory loss?

A Correct.

Q How does your memory loss – short-term or long-term – how does that affect your ability to drive to downtown Dallas?

A It might affect my directions to get to the work location.

Q You said it might?

A It might. I don't know. I'm not familiar with downtown that well. You know, here again surroundings that I have already been in, I'm capable of doing. But if it's something new because of the cognitive brain injury, I cannot learn to do.

Q Now, you just testified that with directions you can pretty much get to a destination?

A Usually. I do have difficulty. I'll be in Plano – I know Plano very well. To this day I get turned around in Plano.

Q In your petition you state that because you were unable to travel a great distance, you were essentially forced out of your job, is that correct, because you couldn't travel to Dallas you were essentially terminated by Southwestern Bell?

A I don't know why I was terminated by [118] Southwestern Bell.

Q Well, in your petition you state you were constructively discharged because you were given a choice to take a job in Dallas –

A Right.

Q – and that was – you couldn't do that, so you were essentially terminated?

A Correct.

Q Is that your allegations in this case?

A I'm not understanding what you're saying.

Q Well, in your petition through your attorneys you stated that Southwestern Bell offered you a position in Dallas –

A Correct.

Q – and that you were unable to travel to Dallas?

A Because of my cognitive brain injury disability.

Q Yes. And therefore because you couldn't take the job in Dallas you were essentially given no choice but to be terminated?

A Terminated?

Q Yes.

A Evidently so I was never offered another position anywhere else when there were positions open [119] in Garland, there were positions open in Plano for engineering clerk and in Richardson for engineering clerk.

Q I understand that, but with respect to your claim of constructive discharge, is that your allegation that you couldn't travel to Dallas so you had no choice and you were terminated?

A Is that how I see it?

Q Yes.

A As far as Southwestern Bell is concern.

Q Yes.

A Yes.

Q Just elaborate – explain that to me. Explain how that option of driving to Dallas essentially forced you out of the company?

A From what I gathered that was the only job they offered me. Here again I will state there were positions in Plano for engineering clerk there were positions in Richardson for engineering clerk. There was an information office in Garland. Why couldn't Southwestern Bell have transferred me somewhere closer where I was familiar with the surrounding or if it was Garland I would have moved to Garland.

Q With respect to the job in Dallas, though –

[120] A I'm sorry?

Q With respect to the job in Dallas –

A Okay.

Q And I'm focusing on Dallas because we know that's a job that you were offered. And I know you keep telling me about Garland and Plano and some other places and we'll get to that. You just felt that there was no way you could take the jobs in Dallas?

A My doctors felt that I could not take the job downtown because of my cognitive brain injury and my disability, physical and mental.

Q You told me that because the distance was so great?

A The traffic. I mean, the traffic on Central, you know, it takes you a long time to get downtown anyway regardless of the traffic. With the traffic it's too stressful

for me to deal with to get all the way from McKinney to downtown.

Q The downtown Dallas position was a directory assistance position?

A Yes.

Q A couple of times now you referred to Garland and Plano and clerk positions?

A Uh-huh.

* * *

[125] really don't.

Q Well, I mean, it was after you left for the DML?

A Yes, it was.

Q At that meeting were you given options on what you could do as an employee who was about to be surplussed [sic]?

A Yes, but I don't remember everything that I was given. I know I was given options. I do know the options I had was to transfer to Garland. I could have gone there. I would have moved to Garland; that's why I lived in McKinney because I worked in McKinney.

Q You said Garland was one of the options you were given?

A A lot of the operators when they were selecting offices, from what I recall, either went to Garland as operators or they went to Greenville. I had the option of going to Greenville also, or they had options of putting in

their surplus transfers for other positions within the company that were available.

Q Were you made aware in that meeting that as a surplus employee you and your other directory assistance coworkers were given preference over other [126] people when you transferred to other places?

A People off the street you mean?

Q Yes.

A Yes.

Q So you knew that as part of this group of people who were being surplussed [sic], people who were a part of a facility that was closing, that you guys could send out transfer requests to other places and get some type of preferential treatment?

A Yes.

Q And you knew that McKinney – I'm sorry, the Greenville, Texas and the Garland, Texas offices were two of the offices that some of the operators were going to?

A Right.

Q What prevented you during that process from going to McKinney or to Greenville, Texas?

A I was never offered a position to go to either location. I was offered nothing. The office in McKinney – like I said, Linda Baird specifically told me that when I came back to that office, I would have a different position. But no one ever gave me the option of going to Garland or Greenville. I could have gone to Greenville. I could have done that possibly.

[127] Q Well, I'm confused?

A Or Garland.

Q I'm confused because you said –

A I'm very confused also.

Q You said you went to a meeting –

A Yes, I did go to a meeting.

Q Where you and all the other operators were told these are your options because the building was closing?

A Right.

Q This facility is closing is what they told you?

A Correct.

Q And you said you understood it to be that you and the other operators had options to go Greenville, Texas to a facility there to Garland, Texas or to other facilities in the area. Now, you're testifying that you didn't have any options to go to Garland or to Greenville, Texas?

A Okay. That's because the transfer – I was supposed to be putting in a blanket transfer – something, here again, with the lady downtown, okay, with my transfer surplus, transfer, blanket transfer or what. Something was wrong with it. I don't know specifically right now or recall what the problem [128] was, but in Dr. Farkas' notes she has the reasons.

Q The reasons for what?

A For what the problem was with the transfer. I'm thinking it was a blanket transfer, now that you keep speaking of this meeting. I think it was a blanket transfer.

Q What is a blanket transfer?

A I have no idea, okay. It just comes to mind.

Q Do you remember whether you had problems transferring because you were out on disability leave?

A I was out on disability leave up until March of 1998, and then the doctor released me to go back to work.

Q Well, your testimony earlier was that you remained on disability leave of absence until December '98?

A Yes, I did, that's because, here again, Dr. Farkas –

MR. BAXTER: Sharon, just answer his questions.

THE WITNESS: Okay.

Q (By Mr. Guy) You were out on disability leave of absence until December of 1998?

* * *

[137] A The loss of salary. Once I went on disability, I received, I think it was 12 weeks of full pay, after that it's half pay. I drained my savings; it's gone. I don't know what else, you know – what to say. I don't know what you're wanting.

Q I want to know how you've been harmed mentally other than – you said they gave you the DML and you thought that was unfair, you said you drained your savings, any other ways mentally speaking that you've been harmed?

A Just the anguish that that department has put me through.

Q That department being –

A In McKinney.

Q And you said the anguish they put you through as a result of the discipline, the DML?

A The DML. For me to make a decision making leave to give them an answer to take the day off to make a decision making leave.

Q Is there any other way that that department, McKinney office, caused you mental anguish?

A Not up until this point, no.

Q Is there any other way that you've been [138] harmed that we haven't talked about? We talked about financial losses, we talked about the mental anguish that Southwestern Bell caused you, is there anything else as far as –

A My retirement.

Q – negative effects?

A Yeah, my retirement. I have no retirement now. Here again, financially, every two years I would get a new car. I've still got the same car I had in '96.

Q Anything else?

A I don't think so.

Q So now we've talked about all the harm or damages that you can think of that were caused by Southwestern Bell; is that correct?

A Probably not all of them. Right now I cannot think – I'm not thinking straight right now because you have me very confused about what answer you are wanting.

Q Anything else that you can think of, though, besides things we've talked about?

A Not right now I can't think of anything else. Not that it won't come up, it might.

Q You testified that you receive Social Security benefits?

[139] A Correct.

Q How long have you been receiving those?

A Since I was terminated in January of 1999. I believe, I started getting my checks in about April, March or April of that year. I had to – with Southwestern Bell – yeah, okay, I'm disabled. Yes, I could have stayed home and collected my Social Security disability, but I didn't want to. I wanted to go back to work. I wanted to work and be a fulfilled person like I was.

Q So you've been getting Social Security benefits since March or April 1999?

A March or April, correct.

Q And you continue to get those today?

A Yes, I do.

Q How much do you receive per month in benefits?

A $1073 now. It started out at $909 something.

Q Is that the net amount that you get –

A Yes –

Q – 1073.

A – right now.

Q Are there any taxes paid on that at all?

A No.

[140] Q What was the basis for you application for Social Security benefits; do you know?

A I was forced into taking my benefits from Social Security because I was terminated by Southwestern Bell.

Q After you left Southwestern Bell, I assume your testimony is that you were still able to work. If you had a job you could have done it?

A Yes, if I had a job, I could have done it.

Q Did you apply for jobs at other places?

A I have, yes. I have applied with a lot of the telecommunications companies within the area, but nobody is hiring. I applied for a job as a clerk at teacher's store, and I don't remember the name of it. I was up front with the manager, told him about my disability, I was not hired. I've also applied at two Mailbox Et Cetera, which are now UPS, and they did not hire me. I've applied at LTC, which is a telecommunications local – I have a friend working there – they didn't hire me.

I've applied at Alcatel, TXU, I've applied at GTE, Sprint, MCI, all of your telecommunications companies that are located in this area.

Q Have you made any of these applications

* * *

No. 04-906

IN THE

Supreme Court of the United States

SHARON ZIMMER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

DANNY S. ASHBY
Counsel of Record
JIM HUNTER BIRCH
EVAN S. TILTON
HUGHES & LUCE, L.L.P.
Suite 2800
1717 Main Street
Dallas, TX 75201
(214) 939-5500

Counsel for Respondent

192524

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Fifth Circuit erred in affirming the District Court's grant of summary judgment against Zimmer on her disability discrimination claim based on Zimmer's failure to submit any evidence that she was replaced by or treated less favorably than non-disabled employees?

CORPORATE DISCLOSURE STATEMENT

Southwestern Bell Telephone Company, L.P. is a wholly owned subsidiary of SBC Communications Inc., a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. No Circuit Split Exists On The Question Presented	4
A. All Circuits Require Plaintiffs to Make a *Prima Facie* Showing of Disability Discrimination	5
B. Minor Semantic Differences in the Elements of a *Prima Facie* Case for ADA Claims Do Not Create a Circuit Split	6
C. Zimmer Would Not Have Survived Summary Judgment Under Any of the *Prima Facie* Burdens She Cites	9

Contents

	Page
II. *Desert Palace* Is Inapplicable To This Case	10
III. Zimmer's Complaints That The Fifth Circuit Incorrectly Affirmed The District Court's Factual Findings And/Or Misapplied Properly Stated Law Do Not Merit Review	12
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Bunting v. Mellen,
124 S. Ct. 1750 (U.S. 2004) 8

Butler v. City of Prairie Vill.,
172 F.3d 736 (10th Cir. 1999) 5

Daigle v. Liberty Life Ins. Co.,
70 F.3d 394 (5th Cir. 1995) 5

DeLuca v. Wiser Indus., Inc.,
53 F.3d 793 (7th Cir. 1995) 5, 6, 9

Desert Palace, Inc., v. Costa,
539 U.S. 90 (2003) 4, 10, 11, 14

Duncan v. Washington Metro. Area Transit Auth.,
240 F.3d 1110 (D.C. Cir. 2001) 5

Ennis v. National Ass'n of Business & Educ. Radio, Inc.,
53 F.3d 55 (4th Cir. 1995) 5, 6, 7, 9

Heyman v. Queens Village Comm. for Mental Health,
198 F.3d 68 (2d Cir. 1999) 5

Hilburn v. Murata Elec. N. A., Inc.,
181 F.3d 1220 (11th Cir. 1999) 5

Cited Authorities

Page

Jacques v. Clean-up Group, Inc.,
96 F.3d 506 (1st Cir. 1996) 5

Lawrence v. National Westminster Bank,
98 F.3d 61 (3d Cir. 1996) 5

McDonnell Douglas v. Green,
411 U.S. 792 (1973) ..... *passim*

McInnis v. Alamo Cmty. Coll. Dist.,
207 F.3d 276 (5th Cir. 2000) 5, 7

Monette v. EDS Corp.,
90 F.3d 1173 (6th Cir. 1996) 5, 8, 10

Postal Service Bd. Of Governors v. Aikens,
460 U.S. 711 (1983) 11

Rachid v. Jack in the Box, Inc.,
376 F.3d 305 (5th Cir. 2004) 10-11

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 11

Snead v. Metropolitan Prop. & Cas. Ins. Co.,
237 F.3d 1080 (9th Cir. 2001) 5

Stanback v. Best Diversified Prods., Inc.,
180 F.3d 903 (8th Cir. 1999) 5

Texas Dep't. of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 6

Cited Authorities

Page

Rules

Sup. Ct. R. 10 ..... 12, 13

Sup. Ct. R. 10(a) 4

INTRODUCTION

The Fifth Circuit applied the widely accepted *McDonnell Douglas*[1] framework to Petitioner Sharon J. Zimmer's claim of disability discrimination and affirmed the District Court's grant of Southwestern Bell's Motion for Summary Judgment. The Fifth Circuit held that Zimmer failed to present any evidence that she was discharged or that she was replaced by or treated less favorably than non-disabled employees. Zimmer's petition presents no circuit split of authority on an important matter, no conflict with state law, and no issue of first impression. The Fifth Circuit correctly applied the *McDonnell Douglas* burden shifting analysis when it affirmed the District Court's grant of summary judgment. Review by this Court is unnecessary and should be denied.

STATEMENT OF THE CASE

Plaintiff-Petitioner Sharon J. Zimmer ("Zimmer") worked as a directory assistance operator for Defendant-Respondent Southwestern Bell Telephone Company ("Southwestern Bell") at its McKinney, Texas facility from March 1993 to February 1, 1996, and from September 1996 to late November 1997. [R. at 137-38, 142-43].

On February 1, 1996, while being pursued by police, Zimmer suffered serious injuries in a single car accident. [R. at 149-53]. As a result of her injuries, Zimmer took paid short-term disability leave from Southwestern Bell from February until September 1996. [R. at 142-43]. Zimmer testified that upon her return to work in September 1996, she was able to perform her job as well as she did before the accident. [R. at 143, 156-59, 176-78, 212, 216-17].

---

1. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Zimmer worked without incident until Thanksgiving Day 1997. [R. at 143]. On that day, Zimmer had an altercation with another Southwestern Bell employee. [R. at 143-44, 162-65]. Because she "created an office disturbance, causing customer service to be affected," Southwestern Bell gave Zimmer a Decision Making Leave approximately one week later. [R. at 166-70]. Under Southwestern Bell's established procedure, Decision Making Leave was a one-day leave with pay to allow Zimmer to decide whether she wished to continue her employment with Southwestern Bell. [R. at 166-70].

During her one-day Decision Making Leave, Zimmer visited her psychiatrist who recommended that she take a paid short-term disability leave. Zimmer testified she experienced stress and anxiety as a result of her confrontation with the other operator and her receipt of the Decision Making Leave. [R. at 159-60, 170-73, 213, 217]. While Zimmer was on paid leave, Southwestern Bell closed its McKinney, Texas facility. [R. at 220].

Southwestern Bell offered Zimmer a position as a directory assistance operator in its downtown Dallas facility. [R. at 218-19]. Although this was the same position Zimmer had in Southwestern Bell's McKinney office, Zimmer rejected Southwestern Bell's offer. [R. at 218-19]. In December 1998 or January 1999, after Zimmer rejected Southwestern Bell's offer of employment in its Dallas office, Southwestern Bell changed Zimmer's employment status from paid disability leave to "retired" with permanent pension disability and lifetime medical and dental benefits. [R. at 145-48, 189, 191, 213-14].

After receiving a right to sue letter from the EEOC, Zimmer filed suit on April 20, 2001. [R. at 1]. On January 5, 2004, the United States District Court for the Eastern District of Texas,

Sherman Division ("District Court") granted Southwestern Bell's Motion for Summary Judgment. (Pet. App. at 6). The District Court found that Zimmer failed to produce any evidence that she: (a) was disabled as defined under the ADA; (b) was a qualified individual with a disability; (c) had suffered an adverse employment action; or (d) was replaced by or treated less favorably than non-disabled employees. (Pet. App. at 11-24). Because Zimmer failed to meet her *prima facie* burden of disability discrimination, the District Court granted Southwestern Bell's Motion for Summary Judgment. (Pet. App. at 24-25).

Zimmer appealed to the United States Court of Appeals for the Fifth Circuit. On August 31, 2004, and without oral argument, the Fifth Circuit, in a per curiam opinion, affirmed the District Court's decision based on Zimmer's failure to submit any evidence that Southwestern Bell had replaced her, or that she had been "replaced by or treated less favorably than non-disabled employees." (Pet. App. at 3).

REASONS FOR DENYING THE PETITION

Zimmer presents no issues meriting this Court's review. What Zimmer infers is a split in the circuits' application of the *McDonnell Douglas prima facie* burden to ADA claims is little more than semantics. The circuit courts uniformly have imposed an identical requirement for ADA plaintiffs: they must submit some evidence of disability discrimination before the burden shifts to employers to advance non-discriminatory reasons for the employment action taken. Beyond failing to demonstrate any split of authority among the circuits, Zimmer fails to demonstrate how she could have avoided summary judgment under *any* circuit's *prima facie* burden.

Zimmer's invitation for this Court to consider the effect of its decision in *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003) on the *McDonnell Douglas* burden shifting analysis as applied to ADA claims is inappropriate. *Desert Palace* simply establishes that plaintiffs may submit direct or circumstantial evidence to prove discrimination. Zimmer submitted neither. Finally, Zimmer's complaints that the Fifth Circuit affirmed erroneous factual findings or misapplied properly stated rules of law do not merit this Court's review.

I. No Circuit Split Exists On The Question Presented

Zimmer insinuates that a split of authority between the courts of appeals exists because the Fifth Circuit's formulation of her *prima facie* burden under the ADA "is markedly different from that used by other circuits." (Pet. at 11). In reality, no circuit split exists. All circuits require ADA plaintiffs to establish a *prima facie* case of disability discrimination before the burden shifts to the employer to advance a non-discriminatory reason for the adverse employment action.

Minor differences in the way individual courts of appeals describe an ADA plaintiff's *prima facie* burden do not establish that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," which would merit this Court's review. Sup. Ct. R. 10(a). Moreover, Zimmer fails to identify a single circuit where she could have survived summary judgment, rendering any alleged differences between the circuit courts' *prima facie* burdens meaningless in this case. Accordingly, this Court should deny Zimmer's Petition for Writ of Certiorari.

A. All Circuits Require Plaintiffs to Make a *Prima Facie* Showing of Disability Discrimination

Every circuit requires an ADA plaintiff to submit sufficient evidence to establish a *prima facie* case that the employer engaged in disability discrimination before the burden shifts to the employer to articulate non-discriminatory reasons for the employment action taken, and the vast majority have expressly adopted the *McDonnell Douglas* framework. *See, e.g., McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 279-80 (5th Cir. 2000); *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001); *Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001); *Heyman v. Queens Village Comm. for Mental Health*, 198 F.3d 68, 72 (2d Cir. 1999); *Hilburn v. Murata Elec. N. A., Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999); *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 908 (8th Cir. 1999); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 747-48 (10th Cir. 1999); *Lawrence v. National Westminster Bank*, 98 F.3d 61, 68-69 (3d Cir. 1996); *Jacques v. Clean-up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996); *Monette v. EDS Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996); *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995); *DeLuca v. Wiser Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995).

Regardless of the way that each individual circuit court articulates an ADA plaintiff's *prima facie* burden, the plaintiff's underlying obligation to satisfy that burden is the same. As the Fourth Circuit explained, "In general terms, a plaintiff establishes a *prima facie* case by proving a set of

facts which would enable the fact-finder to conclude, in the absence of any further explanation, that it is more likely than not that the adverse action was the product of discrimination." *Ennis*, 53 F.3d at 58 (citing *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). In this case, the Fifth Circuit required nothing more from Zimmer than is required by any other circuit—namely a *prima facie* showing that the alleged adverse action against Zimmer was the product of disability discrimination. The Fifth Circuit correctly held that Zimmer failed to satisfy that burden. (Pet. App. at 4-5).

B. Minor Semantic Differences in the Elements of a *Prima Facie* Case for ADA Claims Do Not Create a Circuit Split

Zimmer argues that the *McDonnell Douglas* formulation used by the Fifth Circuit is "substantially different" than that used by other circuits. (Pet. at 11). That assertion places unwarranted emphasis on minor word variations in the articulation of the *McDonnell Douglas prima facie* standard as it applies to disability discrimination claims.

For example, Zimmer claims that the Seventh Circuit employs a substantially different formulation of the *prima facie* standard than the formulation the Fifth Circuit uses. (Pet. at 12). The Seventh Circuit requires that an ADA plaintiff show: (1) that he was a member of a protected class; (2) that he was meeting his employer's legitimate performance expectations; (3) that his employment was terminated; and (4) the employees not in the protected class were treated more favorably. *DeLuca*, 53 F.3d at 797. The Fifth Circuit requires a showing that the ADA plaintiff:

(1) has a disability or is regarded as disabled; (2) is qualified for the job; (3) was subjected to an adverse employment action on account of the disability; and (4) was replaced by or treated less favorably than non-disabled employees. *McInnis*, 207 F.3d at 279-80.

Both circuits require that ADA plaintiffs submit evidence of disability and an ability to fulfill legitimate job requirements. Both circuits also require ADA plaintiffs to submit evidence of an adverse employment action, and that other non-disabled employees were treated more favorably. While the actual words employed to describe the standard may be different, the ultimate requirement is the same. Both the Fifth and the Seventh Circuits require that ADA plaintiffs submit some evidence that an employer has engaged in disability discrimination before shifting the burden to employers.

The difference between the Fourth Circuit's and Fifth Circuit's articulation of the standard is equally semantic. Both require a showing of disability, ability to perform the job, and an adverse employment action. The Fourth Circuit articulates its final prong as requiring evidence that the adverse employment action "occurred under circumstances that raised a legitimate inference of lawful discrimination." *Ennis*, 53 F.3d at 58. In its final prong, the Fifth Circuit requires ADA plaintiffs to submit evidence that the plaintiff was replaced by or treated less favorably than non-disabled employees. *McInnis*, 207 F.3d at 279-80. Evidence that a plaintiff was replaced by or treated less favorably than non-disabled employees (Fifth Circuit) would also be evidence that the employment action "occurred under circumstances that raised a legitimate inference of lawful discrimination" (Fourth Circuit). There is no meaningful difference in the *McDonnell Douglas* formulation used by the Fourth and Fifth Circuits for ADA claims.

The Fifth Circuit's approach is also similar to that used by the Sixth Circuit. (Pet. at 11-12). Again, the first three requirements are virtually identical. In a minor variation, the Sixth Circuit uses a five prong test rather than a four prong test. *Monette*, 90 F.3d at 1186. The final two prongs of an ADA plaintiff's *prima facie* burden in the Sixth Circuit requires the plaintiff to submit some evidence that the employer knew or should have known about plaintiff's disability and that "the position remained open while the employer sought other applicants or the disabled individual was replaced." *Monette*, 90 F.3d at 1186. The purpose of both formulations in the Fifth and Sixth Circuits is to require plaintiffs to come forward with some evidence to raise an inference of disability discrimination. This Zimmer failed to do.

While the language used in establishing the *prima facie* standard pursuant to *McDonnell Douglas* in ADA claims varies slightly among the circuits, the circuits uniformly require ADA plaintiffs to bring forth some indirect evidence that an employer has discriminated on the basis of disability before shifting the burden to the employer to articulate non-discriminatory reasons for the employment action taken. Zimmer has failed to identify any bona fide conflict among the federal circuit courts regarding an ADA plaintiff's *prima facie* burden. Review by this Court is, therefore, not appropriate. Sup. Ct. R. 10(a); *Bunting v. Mellen*, __ U.S. __, 124 S. Ct. 1750, 1751 (2004) (certiorari not appropriate when "the alleged conflict of authority is more apparent than real.").

C. Zimmer Would Not Have Survived Summary Judgment Under Any of the *Prima Facie* Burdens She Cites

The lack of any substantive difference between the various articulations of an ADA plaintiff's *prima facie* burden is further revealed by Zimmer's failure to demonstrate that she would have avoided summary judgment had she brought her case in the Fourth, Sixth, or Seventh Circuit rather than in the Fifth Circuit. This failure is fatal to Zimmer's request for review.

The Fifth Circuit specifically found that Zimmer was not replaced; instead, she was offered the same position in another office. (Pet. App. at 3.) The Fifth Circuit also found that Zimmer submitted no evidence "that others were offered jobs at more than one facility," or "that she had requested placement in a smaller city." (Pet. App. at 3). Ultimately, the Fifth Circuit affirmed the District Court's grant of summary judgment because Zimmer submitted no evidence that she was treated differently from others similarly situated or that Southwestern Bell treated her less favorably than other non-disabled employees. (Pet. App. at 4-5).

Zimmer's failure to submit evidence of less favorable treatment would have resulted in summary judgment in the Seventh Circuit as well. *DeLuca*, 53 F.3d at 797 (requiring ADA plaintiffs to submit evidence that other employees in a non-protected class were treated more favorably). Similarly, Zimmer failed to produce evidence that she suffered an adverse employment action that "occurred under circumstances that raised a legitimate inference of lawful discrimination," as required by the Fourth Circuit. *Ennis*, 53 F.3d at 58. The fact that Zimmer was not replaced, as the

Fifth Circuit found (App. Pet. at 3), is also fatal to Zimmer's claims under the analysis articulated by the Sixth Circuit. *Monette*, 90 F.3d at 1186 (requiring ADA plaintiffs to submit evidence that the position they wanted remained open while the employer sought other applicants or replaced the disabled worker).

There is no substantive difference between the circuits' articulation of an ADA plaintiff's *prima facie* burden, much less a true conflict meriting this Court's review. Whatever differences may exist are moot because Zimmer cannot show she would have survived summary judgment regardless of which articulation of her *prima facie* burden was applied.

II. *Desert Palace* Is Inapplicable To This Case

Zimmer invites this Court's review to determine the effect, if any, of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), on the *McDonnell Douglas* burden shifting analysis as applied to ADA claims. (Pet. at 16-25). In *Desert Palace*, this Court held that a plaintiff may establish proof of an illegal motive by either direct or circumstantial evidence. *Desert Palace*, 539 U.S. at 101-02. *Desert Palace* does not help Zimmer because she failed to submit either direct or circumstantial evidence that Southwestern Bell acted based on an illegal motive. In fact, the Fifth Circuit specifically found that Southwestern Bell had never even replaced Zimmer. (Pet. App. at 3). Although interesting, the precise impact of *Desert Palace* on *McDonnell Douglas* generally, and ADA claims specifically, is of no import here.

The Fifth Circuit has held that *Desert Palace* modifies the final step of the *McDonnell Douglas* burden shifting analysis. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312

(5th Cir. 2004). The Fifth Circuit's approach appears to be well reasoned. Nothing in *Desert Palace* would suggest that this Court intended to overrule more than thirty years of jurisprudence developed under the *McDonnell Douglas* analysis or to limit the application of that analysis to summary judgment considerations.[2] Indeed, the *prima facie* case can establish the circumstantial evidence necessary to support a mixed motive jury instruction under *Desert Palace*, as evidenced by this Court's citation to *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), cases that are direct progeny of *McDonnell Douglas*. *See, Desert Palace*, 539 U.S. at 99-100. The citation to those cases suggests that the *Desert Palace* mixed motive instruction comes into play only after the plaintiff has established a *prima facie* case and the case is at the final step of the *McDonnell Douglas* analysis. Zimmer, however, never made it to the last step. The Fifth Circuit correctly held that she failed to establish a *prima facie* case of disability discrimination, *i.e.*, she produced no evidence of a discriminatory motive, circumstantial or otherwise, to shift the burden of proof to Southwestern Bell. (Pet. App. at 5). Because *Desert Palace* is not implicated to this case, the Petitioner's argument does not raise a proper basis for this Court to grant Zimmer's Petition.

---

2. *Desert Palace* does not even contain a reference to *McDonnell Douglas*.

III. Zimmer's Complaints That The Fifth Circuit Incorrectly Affirmed The District Court's Factual Findings And/Or Misapplied Properly Stated Law Do Not Merit Review

In her final two issues, Zimmer asserts that if the Fifth Circuit applied the correct *prima facie* standard, then it: (i) erred in its application; and (ii) ignored direct evidence of disability discrimination. (Pet. at 26-30). Neither issue merits the Court's review.

Zimmer argues that if the Fifth Circuit applied the appropriate *prima facie* standard to Zimmer's disability discrimination claim, it erred in affirming the district court's grant of summary judgment. (Pet. at 26-28). This is nothing more than a complaint that the Fifth Circuit misapplied properly stated law, which does not merit this Court's review. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Zimmer also complains that the Fifth Circuit erred by affirming a series of the District Court's factual findings. For example, the Fifth Circuit affirmed the District Court's factual finding that Zimmer produced no evidence that she ever requested a transfer to a smaller city. (Pet. App. at 3). Pointing to her own testimony "that her doctor engaged in numerous conversations with Southwestern Bell attempting to negotiate Zimmer's return to work," Zimmer infers that her doctor requested that Southwestern Bell offer Zimmer a position at another location other than Dallas. (Pet. at 27).

However, Zimmer submitted no evidence of such a request. As the Fifth Circuit observed, Zimmer did not "produce evidence that she requested a placement in one of the smaller cities." (Pet. App. at 3). To overcome this lack of evidence, Zimmer improperly endeavors to shift her burden of proof to Southwestern Bell who she claims "made no showing to disprove that Zimmer's psychiatrist requested alternate locations," or "that change in location was not the principal focus" of discussions between the EEOC and Southwestern Bell. (Pet. at 27). The Fifth Circuit correctly rejected Zimmer's argument and noted that it was Zimmer who bore the burden of proof on this issue, not Southwestern Bell. (Pet. App. at 3-4).

Zimmer also asserts that the Fifth Circuit ignored direct evidence of discrimination. (Pet. at 28-30). The Fifth Circuit disagreed that Zimmer had submitted direct evidence of disability discrimination because it found that Southwestern Bell never replaced Zimmer as she asserts. (Pet. App. at 3). Finally, even if these factual findings could be considered erroneous (and they cannot), that error simply does not warrant this Court's review. Sup. Ct. R. 10.

CONCLUSION

There is no circuit split for the Court to consider. All ADA plaintiffs, regardless of which circuit they reside in, must submit some evidence of disability discrimination before the burden of proof shifts to the employer to articulate a non-discriminatory reason for the employment action taken. The Fifth Circuit properly held that Zimmer failed to satisfy her *prima facie* burden. Because *Desert Palace* does not apply *to this case*, this Court should not grant review to determine how that decision might apply to *other* ADA claims. Finally, Zimmer's complaints that the Fifth Circuit misapplied proper statements of the law and/or erroneously affirmed the District Court's factual findings, even if true, do not merit this Court's review. Zimmer had her day in court, and she failed to meet a well-settled evidentiary burden. Zimmer's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANNY S. ASHBY
Counsel of Record
JIM HUNTER BIRCH
EVAN S. TILTON
HUGHES & LUCE, L.L.P.
Suite 2800
1717 Main Street
Dallas, TX 75201
(214) 939-5500

Counsel for Respondent